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2010

# Intellectual Property and the Safeguarding of Traditional Cultures

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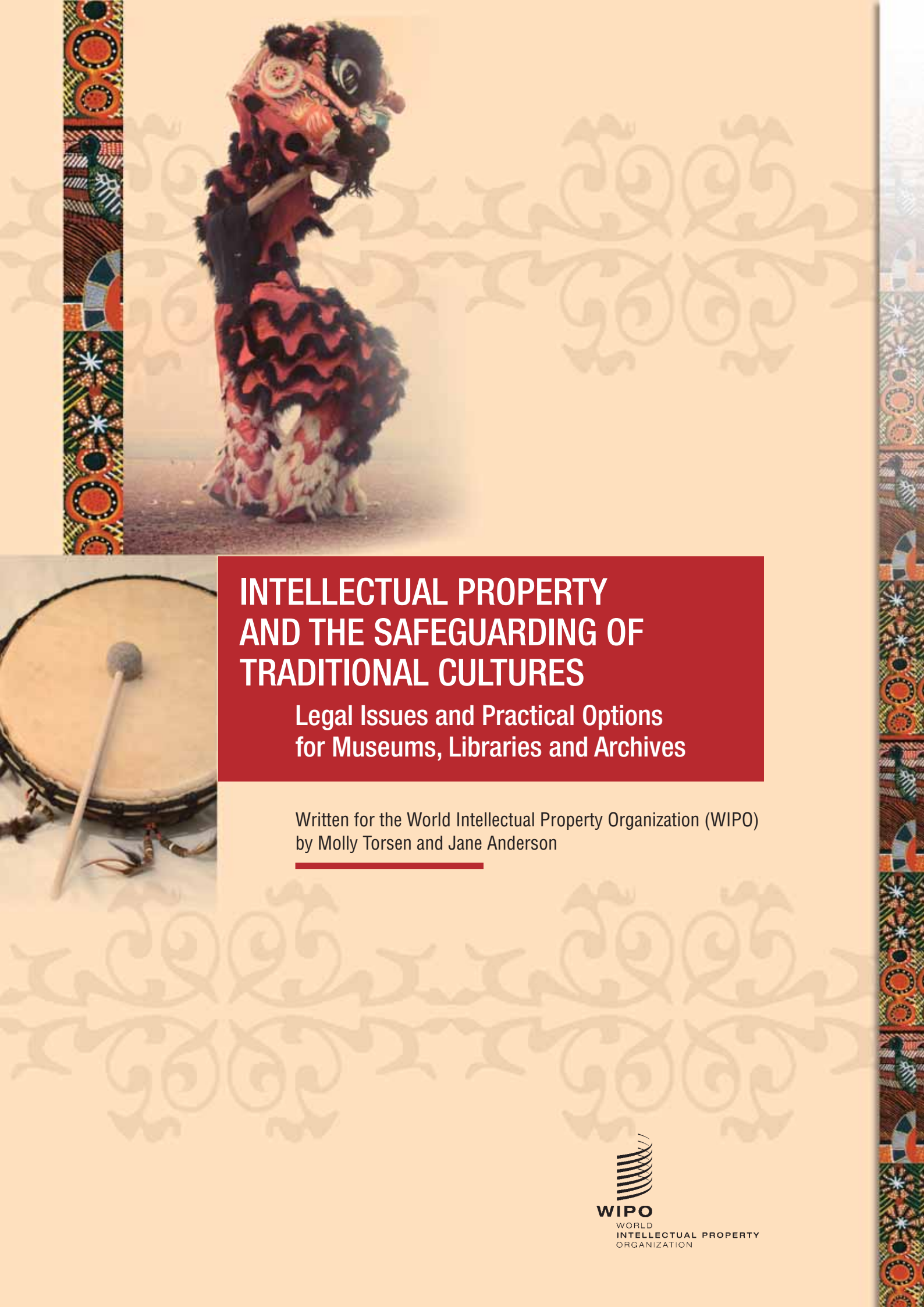


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# INTELLECTUAL PROPERTY AND THE SAFEGUARDING OF TRADITIONAL CULTURES

Legal Issues and Practical Options  
for Museums, Libraries and Archives

Written for the World Intellectual Property Organization (WIPO)  
by Molly Torsen and Jane Anderson

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Disclaimer: This publication does not necessarily represent the views of WIPO or any of its Member States. The publication identifies IP issues that museums, libraries, archives and other cultural institutions come across in their daily activities, on the basis of international IP principles as expressed in the major international IP instruments. Where possible, case-studies and examples from individual countries are used to illustrate certain points. However, national IP laws can differ in certain key respects, and some of the information provided in this publication may not accord with the national laws in your country. This publication is not a substitute for legal advice. You should consult your national legislation and seek legal advice in cases of uncertainty.

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December 2010



## FOREWORD

Traditional cultures embody exquisite and distinctive creativity and are of immense cultural, historical, spiritual and economic value to indigenous peoples and traditional communities the world over.

Defining the appropriate role of intellectual property (IP) in the protection, preservation and promotion of traditional cultural expressions (TCEs) is a priority for the World Intellectual Property Organization (WIPO), and is the subject of various normative and capacity-strengthening programs.

WIPO's work is, partly, based upon the growing interests of indigenous peoples and traditional communities in owning, controlling and accessing documentation of their cultures held by museums, libraries and archives.

These institutions play an invaluable role in the preservation, safeguarding and promotion of collections of TCEs, such as photographs, sound recordings, films and manuscripts, which document communities' lives, cultural expressions and knowledge systems.

Yet, collections of TCEs raise unique IP challenges and, in response, institutions and researchers in many countries are developing new frameworks for understanding the legal, cultural and ethical implications of caring for TCEs.

Through this shift, cultural institutions seek more direct and instrumental relationships with communities, actively engaging with the expertise of tradition-bearers, to foster new cross-cultural partnerships to enrich cultural work. Many museums, libraries and archives, and their professional associations, have established exemplary practices and protocols to deal with IP issues.

It is within this complex and sensitive context that this publication was prepared, in the framework of the WIPO Creative Heritage Project.

The publication presents an analysis of the legal questions and offers examples of institutional and community experiences in the development of good practices.

It uncovers the problems that may arise and their possible solution, and helps guide initiatives to build new relationships for the successful management of TCEs.

In addressing IP issues associated with managing access to, control over and use of TCEs in the world of cultural institutions, I hope that this publication also contributes to a greater understanding of the challenges and options for WIPO's normative work on these issues.



Francis Gurry  
Director General,  
WIPO

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## EXECUTIVE SUMMARY

Museums, libraries and archives carry collections of photographs, sound-recordings, films and manuscripts that document indigenous peoples' and traditional communities' lives, cultural expressions and knowledge systems.

A new awareness has emerged of indigenous peoples' and traditional communities' interests in owning, controlling and accessing this documentation.

Importantly, this has led to recognition that the management of access and use of collections raises a number of challenges for museums, libraries and archives. Often these challenges arise from the complex social, historical, cultural, legal and political conditions informing the collections of such institutions.

Managing access and use of collections inevitably implicates intellectual property (IP) law, policy and practice. Indeed, collections of traditional cultural expressions (TCEs) from indigenous peoples and traditional communities raise unique IP issues because of certain qualities that make them fundamentally different from other collections. The very nature of TCEs means that they occupy an ambiguous IP status. This can produce a myriad of tensions for institutions that hold this material. Further, according to current copyright and related rights law, rights in the materials embodying TCEs (e.g. "secondary" materials such as films, sound recordings, photographs or written documents) often do not belong to the creator or his community, but rather to the person or persons who "created" the secondary materials.

A central problem is that indigenous peoples and traditional communities remain legally disenfranchised from their TCEs, while at the same time seeing themselves as their legitimate custodians, owners and managers. Furthermore, there is at present no clear international legislative framework to provide guidance over the management, access and use of expressions and manifestations of "traditional" cultures.

In responding to such challenges, institutions in many countries are seeking to develop new frameworks for understanding the legal, cultural and ethical implications inherent in caring for ethnographic materials (and in preserving, promoting and protecting them). Cultural institutions seek more direct and instrumental relationships with indigenous peoples and traditional communities, actively engaging with the expertise of these tradition-bearers, to foster new cross-cultural partnerships that could both enrich cultural work and benefit the communities. Many museums, libraries and archives, and their professional associations, have established exemplary practices and protocols to deal with these issues. This publication seeks to identify and discuss some of these.

This is not always a comfortable discussion. Yet, it befits both indigenous and traditional communities and cultural institutions to step beyond this uneasiness in order to understand how best to protect, promote and provide stewardship for the rich cultural heritage that communities have shaped over millennia, and constantly shape and reshape. As many institutions have discovered, working with communities often provides invaluable information about the collections and their social and cultural meanings. By the same token, such relationships may benefit indigenous peoples and traditional communities.

It is within this complex and sensitive context that this publication seeks to prompt an open discussion on what problems may arise, what solutions are available and how new relationships between institutions and tradition-bearers can be established for the successful management of such valuable material.



For example, how can museums, libraries and archives respond to tradition-bearers as a user group? For their part, how can indigenous and traditional communities participate more directly in the recording, digitization and dissemination of their own cultural expressions, for safeguarding, promotional and income-generating purposes? How might museums, libraries and archives and tradition-bearers collaborate in this regard? And if they elect to do so, how might this new relationship be imagined and then translated into practice? While this publication is not designed to definitively answer such questions, Part III, *Practices, Remedies and Options*, illustrates a range of current projects that use these questions as points of departure for the development of new practices. This Part shows how such difficult issues can be addressed and how new practices are currently emerging.

The publication has been prepared as part of WIPO's Creative Heritage Project.<sup>1</sup> It draws on information gathered through surveys<sup>2</sup> conducted in several cultural institutions from around the world by experts commissioned by WIPO, namely, Antonio Arantes, Vladia Borissova, Shubha Chaudhuri, Laurella Rincon, Martin Skrydstrup and Malia Talakai. It also builds on and complements traditional IP guides for museums, libraries and archives on more conventional IP issues, such as the *WIPO Guide on Managing Intellectual Property for Museums*.<sup>3</sup> Indeed, this publication extends the prior body of publications into the context of the legal and ethical IP questions that arise for cultural institutions, specifically with a focus on collections comprising intangible cultural heritage and TCEs.

**Part I, Setting the Scene**, identifies the issues at stake, describes relevant basic concepts and lays out the complex policy debate surrounding these issues.

**Part II, Intellectual Property and Traditional Cultural Expressions: Issues Specific to Museums, Libraries and Archives**, explores the fundamental principles of copyright protection through the lens of TCEs, and provides an overview of other IP fields, including the laws of trademarks and geographical indications. It explicitly examines the precarious balance, established by IP law, between protecting the rights afforded to creators, including indigenous and traditional creators, and protecting the interests of the general public to benefit from and enjoy those endeavors.

As already noted, **Part III** then offers examples of institutional and community experiences in the development of **good practices**, and presents a selection of existing practices, protocols and guidelines. These existing practices, protocols and guidelines are captured in more detail in a searchable database established by WIPO.<sup>4</sup> The surveys referred to above as well as this database complement the publication. Part III also explains risk management strategies and discusses resolution options where conflicts may arise, including alternative dispute resolution (ADR). A Glossary for purposes of this publication and Frequently Asked Questions round off the publication.

This publication does not attempt to advance particular approaches or impose certain solutions for the issues it raises. Rather, it is aimed at providing information to cultural institutions as well as indigenous and traditional communities on contemporary practices in light of current principles and laws and demonstrating the effects that those practices have had on TCEs and the peoples, communities and institutions who claim a relationship with them. It seeks to offer information – not only to help facilitate resolution of particular problems that all cultural institutions may face but also to provide evidence that relationship-building will assist all parties into the future.

## ACRONYMS

<b>ABS</b>	Access and Benefit Sharing
<b>ADR</b>	Alternative Dispute Resolution
<b>AFC</b>	American Folklife Center
<b>AIATSIS</b>	Australian Institute of Aboriginal and Torres Strait Islander Studies
<b>ANSI</b>	American National Standards Institute
<b>ARCE</b>	Archives and Research Center for Ethnomusicology of the American Institute of Indian Studies
<b>ARIPO</b>	African Regional Intellectual Property Organization
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>ATSILIRN</b>	Aboriginal and Torres Strait Islander Library and Information Resource Network
<b>CBD</b>	Convention on Biological Diversity
<b>CISAC</b>	International Confederation of Authors and Composers Societies
<b>DISA</b>	Digital Innovation South Africa
<b>DMCA</b>	Digital Millennium Copyright Act
<b>DNS</b>	Domain Name System
<b>DRM</b>	Digital Rights Management
<b>EoF</b>	Expression of Folklore
<b>EU</b>	European Union
<b>FAO</b>	Food and Agricultural Organization
<b>FPIC</b>	Free Prior and Informed Consent
<b>GR</b>	Genetic Resources
<b>HCPO</b>	Hopi Cultural Preservation Office
<b>HTML</b>	Hypertext Markup Language
<b>ICANN</b>	Internet Corporation for Assigned Names and Numbers
<b>ICH</b>	Intangible Cultural Heritage
<b>ICMR</b>	Indigenous Communal Moral Rights Bill
<b>ICOM</b>	International Council of Museums
<b>IDN</b>	Internationalized Domain Names
<b>IFRRO</b>	International Federation of Reproduction Rights Organizations
<b>IGC</b>	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
<b>ILAM</b>	International Library of African Music
<b>IP</b>	Intellectual Property
<b>MuseDoma</b>	Museum Domain Name Management Association
<b>NAASP</b>	New Asia Africa Strategic Partnership
<b>NISO</b>	National Information Standards Organization
<b>OAPI</b>	Organisation africaine pour la propriété intellectuelle
<b>PARADISEC</b>	Pacific and Regional Archive for Digital Sources in Endangered Cultures
<b>PIMA</b>	Pacific Islands Museums Association
<b>RAM</b>	Random Access Memory
<b>RRO</b>	Reproduction Right Organization
<b>SFMOMA</b>	San Francisco Museum of Modern Art
<b>SGS</b>	Smithsonian Global Sound Project
<b>TCEs</b>	Traditional Cultural Expressions

<b>TK</b>	Traditional Knowledge
<b>TKDL</b>	Traditional Knowledge Digital Library
<b>TLD</b>	Top Level Domain
<b>TPM</b>	Technological Protection Measure
<b>TRAMA</b>	Traditional Music Archive of Sudan
<b>TRIPS</b>	Trade-Related Aspects of Intellectual Property Rights
<b>UDHR</b>	Universal Declaration on Human Rights
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>USA</b>	United States of America
<b>USPTO</b>	United States Patent and Trademark Office
<b>WCT</b>	WIPO Copyright Treaty
<b>WIPO</b>	World Intellectual Property Organization
<b>WPPT</b>	WIPO Performances and Phonograms Treaty
<b>WTO</b>	World Trade Organization



## PART I. SETTING THE SCENE: AN OVERVIEW OF ISSUES

### 1. An Illustration: The Djalambru [Hollow Log] Ceremony<sup>6</sup>

In 1963, a husband and wife team of researchers traveled to central Arnhem Land in the Northern Territory, Australia. In the process of their fieldwork, they recorded in film and sound recordings the important Djalambru [Hollow Log] ceremony.

This ceremony represents one of the final acts in the Yirritja mourning rights – where the body is interned in the Djalambru [hollow log]. The recording of the ceremony featured Djäwa who was the leader of the Daygurrurr Gupapuyngu people.

In 1997, one of Djäwa's sons, Joe Neparrnga Gumbula composed a song called "Djiliwirri" for his band, Soft Sands. The song was about Joe's homeland Djiliwirri – "a forest estate inherited from his father through the Gaykamangu yarrata patriline."<sup>7</sup> The song "alludes to the veiled core of hereditary sacredness held in perpetuity by the Daygurrurr Gupapuyngu."<sup>8</sup>

In creating the video clip to accompany the song, Joe decided to inter-cut the present with the past, and to show images of his father from the 1963 Djalambru recording. As Joe explained, "that Djalambru ceremony was filmed in 1963 with my father [Djäwa] who, during that time, was the leader of the Daygurrurr Gupapuyngu people. I called the [AIATSIS] archives in Canberra where they dubbed it for me from 16-mm to beta cam and then sent it over to Darwin where I was editing my video clip. I've got footage of the Djalambru from this old film, and added it to new technologies to show that that was the old time of Djalambru and that this is the new time of Djalambru. All the people who were in the film from 1963 are all gone. They're all dead. So we, the people of this generation, have made another Djalambru film, which is also in the video."<sup>9</sup>

Joe's video clip almost certainly infringed the copyright of the couple who recorded the ceremony in 1963. The couple made the films and sound recordings: they were the ones who owned the rights in these works and objects of related rights. Without their permission, taking parts of their protected materials to incorporate them into a video clip infringed copyright. Assuredly, Joe and the archive who supplied the film excerpts did not realize that they were violating the law when the recording was copied for use in the music video. Could this perhaps have been excused under an exception or limitation, such as Australian "fair-dealing"?<sup>10</sup> Given that the video clip was to accompany a rock n' roll song, a commercial work, such a use would probably not have fallen under any exception or limitation, despite the cultural dimensions of the situation.

The original Djalambru film (1963) is still very significant for Joe's community; there are even suggestions about digitizing the film and putting it on the community's website. The film itself is seen as educational;

when Djäwa allowed the recording to take place, it was understood that it could be used as a learning lesson for future generations. The community hence perceives the film as theirs.

Who then should be entitled to make decisions concerning the films and recordings? The researchers? The community? The archive?

In this case, the copyright owner, the wife, manages her rights in a strict manner. She fastidiously pursues any unauthorized use of her work. This presents considerable challenges for institutions that hold her work.<sup>11</sup> She is reluctant to let communities reuse the material that she and her husband recorded, and it is often after extensive negotiation that copying permission is acquired. She has very firm ideas about who the material was made for, and who can access it – she has total control over the material.

This state of affairs obviously creates an acrimonious atmosphere in relations with indigenous communities as well as with the institution that holds the original films and recordings. It is onerous on the institution, in terms of time and labor, but may also be considered quite unfair to the community that wants to use material that represents them and their culture.

In such circumstance, how are negotiations to be conducted?

The challenge for indigenous peoples and traditional communities is that, in many instances, they are unable to make physical contact to negotiate with the copyright owner themselves, be it because of location and/or linguistic difficulties.

As to cultural institutions, because of the diversity of cultural material within their collections, the range of strategies that need to be developed to manage the material requires considered thought. Indigenous peoples and traditional communities want to access material so that it can be reinterpreted and new meanings made. However, how these meanings are to be created can contravene the copyright owners' rights in the material. Indigenous peoples' and traditional communities' uses can also fall outside the copyright law's exceptions and limitations, especially in cases where material is commercially valuable.

With changing technological environments and the evolution of copyright law to keep up with these changes, indigenous and traditional interests can sit awkwardly outside of the legal framework. The question is then: how are these seemingly conflicting rights and interests ever to be reconciled?

## 2. What is the Issue?

Contemporary negotiations over indigenous peoples' and traditional communities'<sup>12</sup> rights and interests in their TCEs raise a number of challenges for museums, libraries, archives and other cultural institutions. Often these challenges arise from the complex social, historical, cultural, legal and political conditions informing the collections of such institutions. As the example of the Hollow Log film and recordings illustrates, these challenges can manifest in a variety of ways. Even in circumstances of consultation and negotiation, contests over the rights and responsibilities of cultural institutions to indigenous and traditional community collections can still emerge. This can be attributed to differing value systems and interpretations of history, unequal power relationships in relation to accessing collections, and changing legislative regimes governing ownership, control and use of cultural materials.

TCEs collections possess certain qualities that make them fundamentally different from other collections. Their management thus implies equally different issues.

For example, in the past, TCEs were often collected by researchers from outside of the traditional cultural context, without obtaining consent from the communities.

The collections built thereupon often contain secret, sacred or confidential material that may be subject to restricted use under customary laws and practices.

Moreover, the legal status of such TCEs under IP law is often unclear; for example, according to national IP laws, some may exist in the public domain, and thus be considered free to be used by anyone.

Lastly, while there is a lack of information available to indigenous peoples and traditional communities regarding the existence and location of collection items from their cultural heritage, they wish to be more directly involved in the decision-making processes related to the management of elements of their cultural heritage, which are held by museums, libraries and archives, whether it be in recording, exhibiting, presenting and/or representing their own cultures.<sup>13</sup> Indigenous peoples and traditional communities may also wish to reconnect with those elements of their cultural heritage, allow greater access for children and the community as a whole, and revive the knowledge systems associated with these elements. Others may wish to regain full possession of their TCEs and bring them back into the community to be cared for within the cultural context.

Perhaps the biggest stumbling block for legally recognizing the communities' rights and interests in this material is that, according to current IP laws, most of the rights in the TCE-derived materials are not legally owned by tradition-bearers at all, but rather by the person or persons who "created" the film, sound recording, photographs and manuscripts embodying these TCEs.

In other words, many tradition-bearers remain legally disenfranchised from documentation of their cultural heritage, while they see themselves as the legitimate custodians, owners and managers of that same material. This produces a myriad of tensions for institutions that hold collections of TCEs.

This publication seeks to provide information about the problems that may arise, the solutions available and the new relationships between institutions and tradition-bearers that can be established for the successful management of such valuable collections.

### **3. Building and Strengthening Relationships between Cultural Institutions and Indigenous Peoples and Traditional Communities**

Changing political, economic and social environments over the past two or so decades have prompted certain re-evaluations of the role and function of cultural institutions, including importantly, re-assessment of the very nature of their collections of TCEs. This is not always a comfortable discussion and cultural institutions often find themselves in a precarious situation.

In certain circumstances, questions about access to and use of these collections have had to respond to changing notions of the public and to the rapid increase in new user groups.<sup>14</sup> Indeed, cultural institutions have had to come to terms with new claims to the ownership of collections of TCEs, particularly those relating to indigenous peoples and traditional communities obtained in the past.

These claims often explicitly disclose the politics and historical circumstances that led to the development of the collections in the first place. Indeed, antiquated rationalities governing how peoples were observed, studied and documented often led to large scale accumulations of material related to their TCEs. Everything about the peoples, including songs, stories and artifacts (as well as human remains) was seen as freely available to collect, archive and exhibit. Often the inequalities of status affected the ability of the peoples recorded or studied to express their informed consent.<sup>15</sup>

Many questions arise and need urgent consideration. For example: who owns these collections? To whom do the IP rights associated with these collections belong? How should the collections be accessed, managed and used now and into the future?<sup>16</sup>

Over the past several decades, there has been a publicized absence of trust between indigenous and traditional communities and the cultural institutions that hold pieces of their cultural heritage.<sup>17</sup> Indigenous peoples and traditional communities have not been recognized as rights holders or acknowledged as having legitimate relationships with the material within the collections of such cultural institutions. It benefits both indigenous and traditional communities and cultural institutions to step beyond this awkwardness in order to understand how to best protect, promote and provide stewardship for the rich cultural heritage that indigenous and traditional communities have shaped over millennia.

As many institutions have discovered, working with indigenous peoples and traditional communities can provide invaluable information about the collections. Indeed, tradition-bearers can provide contextual information and personal narratives regarding their accumulation, explain the alternative meanings embedded within them, and outline the access conditions that respect the indigenous or traditional community from which those materials derive, as well as those other users who are keen to learn and understand different cultures and cultural practices from them.<sup>18</sup>

In responding to such difficult legal, cultural and political challenges, institutions in many countries are seeking to develop new frameworks for understanding the legal implications inherent in caring for ethnographic and cultural materials, including TCEs.

These initiatives recognize that there are different world-views of, aspirations and rationalizations for preservation and access. As part of an innovative strategy, it is clear that new agreements, regularly reviewed to ensure their relevance in light of changing law, could help to ensure appropriate policies. The challenge remains engaging in productive dialogue about these issues and building strategies that incorporate them within future management practices.

Cultural institutions would benefit from gaining a basic understanding of the communities whose materials are in their collections and from determining who may access the materials, under what circumstances, and whether the source community has specific preferences regarding the reproduction of their materials.

Just as communities are asserting themselves as legitimate rights holders who should be actively in control of how they are represented, several cultural institutions worldwide see themselves increasingly not as *owners* but as *custodians* of their collections. Through this shift, cultural institutions seek more direct relationships with indigenous and traditional communities, actively engaging with indigenous and traditional people with expertise, to foster new cross-cultural partnerships that could enrich cultural conservation work and benefit indigenous and traditional communities.

With this context in mind, it is useful to ask the following questions: How can museums, libraries and archives engage better with indigenous and traditional communities in the management of their TCE collections? For their part, can indigenous and traditional communities participate more directly in the recording, digitization and dissemination of their TCEs, for safeguarding, promotional and income-generating purposes? How might museums, libraries and archives collaborate with indigenous and traditional communities in this regard? And if they elect to do so, how might this new relationship be imagined and then translated into practice?

While this publication is not designed to definitively answer such questions, Part III illustrates a range of projects that use these questions as stepping stones for the development of new practices.

#### 4. Exploring the Intellectual Property Dimension

There have been several academic studies, legal battles and commentary written about the validity of the ownership by a cultural institution, gallery or private individual of tangible objects or “pieces of the past.”<sup>19</sup> There has been less analysis, however, of the intellectual component of TCEs, and especially of the IP dimension. The relationship between IP and TCEs is nuanced and complex.<sup>20</sup> One of the elements of contestation over the intellectual aspects of TCEs today is the uncertainty over the intellectual ownership, control and use of collections held within cultural institutions.

The 2007 United Nations Declaration on the Rights of Indigenous Peoples explicitly addresses these as urgent and legitimate issues in Articles 11, 12 and 31. Article 31 states:

*Indigenous people have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control and protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.*<sup>21</sup>

The 2007 Declaration also highlights that indigenous peoples have the right to access, practice and revitalize their cultural traditions. Article 12 (1) states:

*Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*<sup>22</sup>

##### **THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES**

The United Nations Permanent Forum on Indigenous Issues is an advisory body to the Economic and Social Council, with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights.<sup>23</sup> The Permanent Forum is coordinating many initiatives aimed at the implementation of the Declaration on the Rights of Indigenous Peoples.



This brings us to complex questions associated with how TCEs are or should be protected by IP. TCEs occupy an ambiguous legal status; they may or may not benefit from one or several branches of IP protection.<sup>24</sup> One difficulty in answering these questions is that no clear legislative framework exists to provide guidance over the management, access and use of TCEs.

As international IP law was born in a very specific cultural context, it does not recognize indigenous or traditional customary laws relating to the ownership and management of cultural knowledge and property.

As previously mentioned, the main obstacle for tradition-bearers in claiming ownership of cultural heritage and TCEs that reside within cultural institutions is that they are often not legally recognized as the rights holders. This means that they have limited capacity to argue and assert legal rights and interests in order to negotiate management frameworks that are culturally appropriate.

Many cultural institutions, at the turn of the 21<sup>st</sup> century, have developed protocols and procedures to protect the rights of tradition-bearers and source communities.<sup>25</sup> There is a growing body of models on which cultural institutions may draw. However, this kind of “soft law” has all too often no real mechanism for enforcement.

To address the gaps in current IP law in relation to TCEs, improved processes for identifying problems in the management of TCEs by museums, libraries and archives must be developed. This includes the development of mutually-beneficial strategies and relationships between cultural institutions and indigenous and traditional communities. The fact that the law is unclear at present should not be an impediment to foster better, more respectful behaviors and practices.

As already noted, there is, as yet, no general international law or legislative framework for managing TCEs.<sup>26</sup> This limbo has produced confusion in terms of how cultural institutions handle their collections, and engage with indigenous peoples and traditional communities, who assert themselves as legitimate rights holders. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) was established in 2000 to fully investigate the extent of these issues.

There are differing sets of values and customs at play. For indigenous and traditional communities, TCEs have intrinsic value as vital elements of their cultural heritage and identity. They hence contribute to the conservation and promotion of cultural diversity.<sup>27</sup>

TCEs are both cultural and economic assets of the peoples and communities who are their creators, practitioners and custodians. TCEs can be economic resources that concretely contribute to providing livelihoods and easing poverty and socio-economic disadvantage for these communities, for example, through craft marketing. Indigenous and traditional communities are generally among the poorest and most disadvantaged in the world – concern for properly dealing with TCEs is not simply an ethical issue.

The rights and obligations that a community might assert in relation to a collection might not map easily onto IP definitions of who constitutes an “owner,” “author,” “creator” or a “user.” Such a disjuncture requires innovative and creative thinking, and importantly, presents an unprecedented opportunity to develop new equitable relationships that take into consideration past histories, legal gaps and future partnerships.

### WHAT ARE TCEs?

There is no settled international definition of TCEs.<sup>28</sup> However, many regional and national laws contain definitions, as do some international instruments. Indigenous and traditional communities often have their own definitions of what constitutes their cultural expressions. The Glossary contains a working description of TCEs for present purposes. TCEs may be seen as a sub-set of “traditional knowledge” – this term is also described in the Glossary. In a nutshell, TCEs may be understood in general as:

- handed down from one generation to another, either orally or by imitation;
- reflecting a community's cultural and social identity;
- consisting of characteristic elements of a community's heritage;
- made by “authors unknown” and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so;
- often created for spiritual and religious purposes; and,
- constantly evolving, developing and being recreated within the community.

### *Can intellectual property systems protect traditional cultural expressions?*

Although all communities may not necessarily adopt a proprietary approach to their TCEs, they nevertheless are opposed to the unauthorized use of their TCEs and do take offence at unauthorized use and all the more so when it is for commercial purposes or is derogatory in nature.

Existing IP measures can be useful to prevent such misuses and misappropriations, especially for the peoples and communities whose primary aims are to prevent the unauthorized use of their creative productions and to exploit their creative arts and contemporary adaptations of their TCEs in the marketplace.<sup>29</sup>

The following are examples of possible protection, which are detailed further in Part II:

- Photographs, sound-recordings and films that document indigenous and traditional customary practices and knowledge are often protected under copyright and/or related rights law, and as such, provide an indirect form of protection for TCEs. These derivatives of TCEs may benefit from existing rights and responsibilities in relation to access, use and reproduction.
- Contemporary expressions of traditional cultures are also protected by copyright, if they meet the required protection criteria.<sup>30</sup>
- The Berne Convention for the Protection of Literary and Artistic Property (the Berne Convention),<sup>31</sup> the pre-eminent international instrument on copyright, provides special protection at Article 15.4 for “unpublished” works of “unknown authors,” a provision added to the Convention specifically to address the protection of TCEs.
- Copyright's resale right is also a potential option to share with the artists and their communities the proceeds from the resale by auction houses and galleries of indigenous and traditional works based on TCEs. Indeed, many indigenous artists' works resell for greater amounts.<sup>32</sup>
- Performances of TCEs are protected internationally by the WIPO Performances and Phonograms Treaty (WPPT).<sup>33</sup>
- Copyright and special tailor-made protection also exists for compilations and databases of TCEs.

- Certification and collective trademarks as well as labels of authenticity have also been used by indigenous communities in, for example, Tonga,<sup>34</sup> Panama<sup>35</sup> and New Zealand<sup>36</sup> to curb the sale of fake traditional creative arts (sometimes called “fakelore”).<sup>37</sup> Fiji, as well as other countries who may have similar initiatives, is working on the idea.<sup>38</sup>

In spite of all this, the conventional IP system has been identified by some as not only inadequate to comprehensively and appropriately protect TCEs but also as positively harmful, in some respects. First, IP rules exclude most TCEs as *such* from protection, relegating them to an unprotected “public domain.” Second, follow-on creations derived from TCEs may receive protection as “new” IP, giving the right owners (whoever they may be) exclusive rights to determine the conditions under which third parties (including the TCE-holding communities themselves) may use the TCE.

Furthermore, the types of rights provided by current IP law and the nature of the rights conferred do not reflect customary laws, values and protocols associated with TCEs; it is perhaps not possible for international IP law to reflect them, as they are often unique and subjective to communities, and vary from one community to the other.

As a result, many stakeholders call for new *sui generis* systems to protect TCEs, i.e., “special” or stand-alone systems which would address TCE issues particularly.<sup>39</sup> Several countries and regional organizations have already put in place national and regional *sui generis* laws and measures. Most countries have done so within their copyright laws, following largely the Model Provisions, 1982. Others have elected to establish stand-alone IP-like laws and systems, such as the Philippines,<sup>40</sup> Panama,<sup>41</sup> Peru, Ghana, *l’Organisation africaine de la propriété intellectuelle* (OAPI),<sup>42</sup> the Andean Community, South Pacific island countries<sup>43</sup> and New Zealand, to name only a few.<sup>44</sup>

In a nutshell, some countries are calling for a *sui generis* approach, while others consider that existing IP law offers many solutions and just needs a few changes, and then others consider that a mixture of *sui generis* mechanisms and existing IP law is the best approach. These options are discussed within the WIPO IGC, among other forums.

## 5. IP and TCEs – the Work of the World Intellectual Property Organization

### *The Intergovernmental Committee*

The protection of TCEs and traditional knowledge (TK) against misappropriation and misuse is the subject of active policy development, norm-building and capacity-building programs at WIPO. Policy development and norm-building takes place within the IGC.

At the 2009 WIPO General Assembly, member states adopted a clearly defined work plan and terms of reference to guide the IGC’s work over the next two years. States agreed that the IGC would undertake negotiations with the objective of reaching agreement on a text of an international legal instrument (or instruments), which will ensure the effective protection of genetic resources (GRs), TK and TCEs. The decision also provided for intersessional meetings of working groups, in addition to the regular sessions of the IGC.

The negotiations build on the previous work of the IGC. The basis for text-based negotiations are the existing WIPO working documents on GRs, TK, and TCEs. The IGC is to submit to the 2011 General

Assembly the text (or texts) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The 2011 session of the General Assembly would then decide on convening a Diplomatic Conference.

Recent sessions of the IGC have examined draft principles and objectives that could shape *sui generis* instruments on TCEs and TK.<sup>45</sup> This approach to protection could recognize, among other things, collective interests in TK and TCEs which are “characteristic” of a distinct cultural identity. These interests would be respected for as long as a traditional community continues to be associated with the knowledge or cultural expressions.<sup>46</sup>

These drafts include compliance with the principle of “free, prior and informed consent” (FPIC) and the recognition of indigenous peoples’ and traditional communities’ customary laws and practices. In line with the views of many indigenous and traditional communities, the draft provisions do not require the assertion of new exclusive property rights over TCEs or TK, but accommodate this option, should communities wish to take it up. Similarly, prior registration or documentation of TCEs and TK is not a precondition for protection, but is optional.

The draft provisions<sup>47</sup> on TCEs address exceptions and limitations to protection in similar ways to copyright law. Specifically, they provide that measures for the protection of TCEs should not apply to their use when that use includes making recordings or other reproductions for purposes of TCEs inclusion in an archive or an inventory for non-commercial cultural heritage safeguarding purposes. This provision would allow cultural professionals to make copies of TCEs during the course of archiving or record-keeping, and especially preservation.<sup>48</sup>

Another useful provision of the draft provisions regards documentation. In addressing formalities, the provisions specify that, to the extent a TCE is registered by a community, any IP rights in such recording or fixation should vest in or be assigned to the community.<sup>49</sup>

While the draft provisions have no formal status and constitute a contentious issue at the IGC, they illustrate some of the perspectives and approaches that are guiding work in this area, and could suggest possible frameworks for the protection of TCEs and TK against misappropriation and misuse. They are in fact being used as points of reference in a range of national, regional and international policy discussions and standard-setting processes, including in other policy areas. For example, they have been used by the African Regional Intellectual Property Organization (ARIPO), the OAPI, countries in the Pacific region, members of the Association of Southeast Asian Nations (ASEAN) and countries in the Caribbean.

### *The meaning of “protection”*

#### **THE SMITHSONIAN INSTITUTION AND ITS GLOBAL SOUND PROJECT<sup>50</sup>**

The Smithsonian Global Sound Project,<sup>51</sup> an initiative of the Smithsonian Center for Folklife and Cultural Heritage, was launched in 2005, and aims to make traditional music globally available on the Internet. The collections that the project holds include the entire Smithsonian Folkways collection and content from partner archives including: the International Library of African Music (ILAM), in South Africa, the Archives and Research Center for Ethnomusicology of the American Institute for Indian Studies (ARCE), in India, and the Aga Khan Music Initiative for Central Asia of the Aga Khan Trust for Culture (Central Asia) and others still to come. The collaborating archives placed parts of their collections on the website, those parts for which permissions could be obtained, and to which free access could be given.<sup>52</sup>

With its interactive features, the project has been dubbed “the ethnographic answer to iTunes.”<sup>53</sup> In order to use a recording, as opposed to just downloading it, a “Licensing Request Form” needs to be filled. The condition, however, is that “licenses and permissions are granted on a case-by-case basis and are at the discretion of the Smithsonian Institution. A license fee may be assessed depending on the nature of the proposed use.” The Smithsonian Institution expressly prohibits the copying of any material (text and image files, audio and video clips) from the website, except for the purposes of “fair use” as defined by United States copyright law. The site claims that: “Royalties go to artists and institutions, and honor the intellectual property rights of composers, musicians, and producers.” In other words, the revenue earned from sales of downloads and subscriptions support the creation of new educational content and are shared with archival partners, who in turn pass on a portion of those revenues to artists and communities.<sup>54</sup>

The work of WIPO concerns most directly the protection of TCEs in a legal sense, that is, protection of the creativity and distinctiveness inherent in TCEs against unauthorized or illegitimate use by third parties, including commercial misappropriation, misuse, misrepresentation and use that is derogatory or offensive. The goals of copyright protection, for example, are largely to promote further creativity, encourage public dissemination and enable the owner to control the commercial exploitation of the work.

It should be noted, however, that not all Member States of WIPO believe that TCEs should be “protected” in this IP law sense. Important questions, such as who should own the rights in TCEs, remain unanswered.

“Protection” in this IP sense is distinguishable from the “safeguarding” or “preservation” of cultural heritage and expressions, but can complement them. Preservation and safeguarding in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of tangible or intangible cultural heritage in order to ensure its maintenance and viability. Protection may thus include safeguarding against loss through archiving, documenting and recording. It may mean acknowledging and giving effect to the broader range of collective and individual rights that are linked to TCEs and their cultural and legal environment. Finally it may also mean building capacity to support traditional creativity and the communities and social structures that sustain and express them.

In relation to the safeguarding and preservation of intangible cultural heritage, much valuable work is being carried out under the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention for the Safeguarding of the Intangible Cultural Heritage, 2003 and the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005.

### *IP and TCEs – Context of misappropriations*

Central questions that have occupied indigenous and traditional spokespeople and academics alike include: when is the use of a TCE legitimate cross-cultural borrowing and when is it “misappropriation”?<sup>55</sup>

Perhaps the most publicized example of this is the successful “Deep Forest” CD produced in 1992, which fused digital samples of music from Ghana, the Solomon Islands and African “pygmy” communities with “techno-house” dance rhythms.<sup>56</sup> Large profits were made from sales of the record, with no returns to traditional musicians and no attribution. The music producers had gotten access to the music from a cultural heritage archive where ethnomusicologists who had recorded the music had deposited the recordings.

Another example is that of t-shirts depicting Australian indigenous rock art, whose production was halted following a letter by a cultural institution demanding to cease production on the basis of copyright infringement.<sup>57</sup> Although the author of the rock art remained unknown and the age of the art was such that copyright was unlikely to subsist in the actual rock art, copyright did subsist in the drawings and photographs made in the late 1960s to 1970s by a researcher funded by the cultural institution: Eric Joseph Brandl. The making of the drawings and the taking of these photographs had indeed created new copyright rights which were enforceable against third parties. These drawings and photographs had been published by the cultural institution in 1973 in a book.<sup>58</sup> Because images of the rock art sites are rare and because the site itself is restricted from public access, it was highly likely that the t-shirt manufacturers had copied the images of the rock paintings directly from this unique publication.<sup>59</sup> The institution, together with Mr. Brandl’s widow, sent a letter to the company that made the t-shirts, which immediately agreed to cease production. The matter was settled after lengthy negotiations.

Another question that arises is who should benefit from the protection of TCEs? Indeed, the argument has been made that since much creativity is derivative, TCEs are the result of centuries-old cultural exchange, thus making the borders between what is owned by one cultural community, as opposed to another, difficult to determine. This also amplifies the challenge of identifying a single community of “owners,” for TCEs that are practiced by more than one cultural group.

There is validity to this questioning; however, the answers to these questions should take into account the significant relationship between TCEs, cultural practices and the way indigenous peoples and traditional communities have historically developed their understanding of the natural world.

Political power is of fundamental importance in terms of understanding how relationships were often established that disenfranchised and denigrated indigenous peoples and traditional communities, their lands and ways of being.<sup>60</sup> The whole issue of TCEs cannot be understood outside the histories of colonization, dispossession and denials of sovereignty. Today, these histories produce urgent questions of identity, cultural maintenance and cultural survival. They also produce tensions because of different value systems, rationalities of knowledge use and cultural exchange. The process of acknowledging the significance of these histories and their relevance to contemporary TCEs is ongoing.

## 6. The objectives and nature of this publication

Through examples and analysis, this publication explores areas of cultural heritage and IP law and policy in order to elucidate questions and issues relating to the management of collections, documents, and recordings related to TCEs by museums, libraries, archives, and other cultural institutions. It explores the role, responsibilities, and range of activities of museums, libraries and archives which raise IP and TCEs considerations.

The publication lays out the IP issues that may arise when acquiring, preserving, displaying, communicating and re-using TCEs and cultural heritage materials.

The focus and structure is the interface between the preservation, protection, and promotion of TCEs, both tangible and intangible. Cultural institutions usually hold (i) tangible expressions (products of arts and handicrafts) and (ii) materializations (photographs, films, audio and audiovisual recordings, transcripts, descriptions) of tangible and intangible expressions and practices.<sup>61</sup> Cultural institutions do not hold – as such – intangible TCEs; what they may do is invite communities to stage/enact intangible practices, expressions or representations on their premises.<sup>62</sup>

WIPO has also recently published a *Guide on Managing Intellectual Property for Museums*,<sup>63</sup> which provides an overview of IP issues particularly in relation to business opportunities for museums. Readers of the present publication are urged to consult this Guide. While it does not provide specific guidance for the treatment or stewardship of TCEs, it does address a range of practical situations and tasks that museum professionals face on a daily basis. The present publication extends this work specifically to address the legal and ethical IP issues associated with TCEs.

IP law establishes a balance between protecting the rights afforded to creators (in an effort to promote further their creativity) and protecting the interests of the public<sup>64</sup> to benefit and learn from those endeavors (in an effort to advance, educate and inspire society as a whole).

The rights of tradition-bearers often sit uneasily within the balance struck by IP law. Indeed IP rights, as they exist now, were not designed with TCEs in mind. From a public policy perspective, IP laws generally do not take into account the needs, concerns, aspirations of indigenous peoples and traditional communities.<sup>65</sup> Different legal jurisdictions throughout the world calibrate this balance differently and some do not recognize the IP rights of tradition-bearers at all.

There are now calls for the enhanced protection of TCEs at the international, regional and national levels. This has resulted in a complex policy debate, in which core concepts are being tested and analyzed. Policy objectives and modalities for achieving them are now emerging.

This publication does not attempt to advocate for particular approaches or impose particular solutions for the issues raised. Rather, it aims to provide information on current practices and their relation to IP principles and laws and to demonstrate the effects those practices have had on the traditional culture, communities, tradition-bearers and institutions who claim a relationship with them. It seeks not only to help facilitate the resolution of unique problems encountered by cultural institutions, but also to reveal that relationship-building is key for the management of TCEs and may help all parties into the future.

In acknowledging the current gaps in the legal management of such collections, the function of this publication is to address a range of questions that cultural institutions are currently grappling with, in the management of their collections, namely:

- What are TCEs?
- What are the specific IP laws relating to cultural institutions and repositories of TCEs?
- What are the specific IP issues that arise when dealing with TCEs?
- What alternative practices in managing TCEs exist?
- What options are there if conflicts emerge?
- What are examples of good practices that could be useful to emulate?

This publication addresses copyright and related rights law, touches on trademark law as currently written and construed in a range of jurisdictions and references other relevant IP laws in the context of TCEs.

It draws parallels between the treatment of TCEs and other cultural goods, such as contemporary art. Building upon the empirical research and analysis undertaken by WIPO in the context of the Creative Heritage Project, the publication does not seek to codify practices nor suggest or create any normative or binding guidelines; rather it offers information on the policies and practices that are currently in place in an effort to promote discussion and encourage critical thought about IP and related options for the management of TCEs.

Indigenous peoples and traditional communities throughout the world may not have the same goals or objectives. Indeed, there is enormous diversity among tradition-bearers of all cultures in relation to customary laws as well as IP needs and expectations.<sup>66</sup> To this end, the publication encourages reflection on how the expectations and aspirations of tradition-bearers for safeguarding and reconnecting with their cultural heritage can be acknowledged as legitimate and embraced within the cultural institution sector.





## PART II. INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS: ISSUES SPECIFIC TO MUSEUMS, LIBRARIES AND ARCHIVES

Part II explores the law of copyright and related rights, trademarks and geographical indications.

Copyright and related rights are the most relevant of IP areas affecting museums, archives, libraries and other cultural institutions. Once a creation is published, given or sold to others, it becomes *de facto*, if not always legally, possible for others to make uses of it: copyright is the right of an author to control the use of his works.

This section explores basic copyright and related rights concepts. It begins with an overview of legal fundamentals and then follows with an analysis of the issues that often arise with the stewardship and protection of TCEs.

As cultural institutions multiply and implement creative strategies to draw the public to their exhibitions, copyright issues become important. Firstly, cultural institutions are in the unique position of being both copyright owners (in their catalogs and CDs sold to the public, for example) and copyright users (in the paintings or sound recordings they reproduce to make such catalogs and CDs, for example). From a financial standpoint, cultural institutions may garner some proceeds from the proper use of copyright law.

Trademarks and domain names are discussed in this part's second section as they are also relevant for the management of TCEs as well as for certain products and services offered by museums, libraries and archives.

Geographical indications are dealt with in the last section.

### COPYRIGHT

International copyright protection does not exist *per se*. Copyright law is jurisdictional in nature and in scope. Many specific issues related to the copyright-TCE nexus are therefore jurisdiction-specific. While some are similar to others, there are many disparities among national laws that need to be highlighted.

The foundation of the Anglo-American copyright law began in 1710 with the Statute of Anne, while Continental European copyright law is often credited to the French Revolution at the end of the 1700s.

Regardless of origins, most countries are party to the Berne Convention, thereby forming the Berne Union.<sup>67</sup> The Berne Convention establishes minimum standards of protection between signatory States.

Article 5(1) lays out the principle of "national treatment" whereby an author's rights are respected in another country of the Berne Union as though the author were a national of that country.<sup>68</sup> For example,

works by Turkish authors are protected by Swiss copyright in Switzerland, and vice versa, because both Turkey and Switzerland are signatories to the Berne Convention.

Likewise, many countries are members of the World Trade Organization (WTO) and are therefore bound by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement).<sup>69</sup> The TRIPs Agreement sets minimum standards of protection for most forms of IP, which apply equally to all member states of the WTO.<sup>70</sup>

In addition to the Berne Convention and the TRIPs Agreement, the WIPO Copyright Treaty (WCT) – concluded in 1996 – brings international copyright law into the digital age.<sup>71</sup>

Additionally, there are regional and bilateral agreements; for example the Bangui Agreement of 1977 created the African Intellectual Property Organization (Organisation africaine de la propriété intellectuelle or OAPI). Some free trade agreements also include clauses on IP.

The Berne Convention addresses “literary and artistic works” which include “every production in the literary, scientific and artistic domain.” TCEs often comprise “productions in the literary, scientific and artistic domain” (for example, TCEs can manifest as art, music, drawings, or sculptures) and may therefore constitute subject matter of copyright protection.

When circumstances allow, the protection provided by copyright law can be appropriate for the needs and objectives of indigenous peoples and traditional communities.

Yet indigenous peoples and traditional communities are often *not* the copyright owners of much of the TCEs found in museums, libraries and archives, and therefore have had limited capacity to negotiate around issues of access, use, ownership of and control over these collections.<sup>72</sup>

Copyright generally comprises economic and moral rights. A special category of rights adjacent to copyright is referred to as “related rights.”

#### OVERVIEW OF KEY POINTS

Copyright law is jurisdictional in nature and in scope. Many specific issues related to the copyright-TCE nexus are therefore jurisdiction-specific.

Tradition-bearers are often not the owners of the copyright and related rights in the recordings, films or manuscripts embodying their TCEs which they have not made themselves.

## 1. Objects of Protection: What Does Copyright Protect and What Does it Not?

The list of protectable material can vary from jurisdiction to jurisdiction. This is important precisely because some of the questions regarding protection for TCEs are specifically tied to what copyrightable subject matter *is*.

Generally, copyright protection extends to original literary (novels, poems, plays, newspapers, computer programs), scientific and artistic works (paintings, drawings, photographs, sculpture, architecture, advertisements), in any form of expression. Copyright laws may thus cover a range of works including, but not limited to, films, musical compositions, choreography, maps, etc.

Generally, copyright protection does not extend to functional aspects, formulaic or other non-original elements of works, such as colors, and techniques used to create a work, or what is sometimes referred to as a work's "style."<sup>73</sup> Copyright permits the imitation of the non-original elements or underlying ideas and concepts of works, allowing for further cumulative creativity and innovation.

#### KEY POINTS

- Copyright provides authors with exclusive rights with regard to their literary and artistic works.
- Copyright consists of both economic and, depending on the jurisdiction, moral rights.
- Copyright laws cover a range of works including, but not limited to, literary works (novels, poems, plays, newspapers, computer programs), films, musical compositions, choreography, maps, and artistic works (paintings, drawings, photographs, sculpture, architecture).

### Originality

Copyright law requires that a work be *original* in order to be protected. The term is not defined in the relevant international treaties, nor is it generally defined in national laws. It is rather a matter left for interpretation and determination by the courts on a case by case basis.

In the civil law tradition, generally speaking, a work is original if it reflects or bears the mark of its creator's personality and/or personal creative talent. In the common law tradition, generally speaking, a work is original if there is some degree of intellectual effort involved and if it has not been copied from someone else's work.<sup>74</sup> In common law jurisdictions (for example, in the United States of America<sup>75</sup>), a relatively low level of creativity is required in order to meet the originality criterion.

In an artistic context, the originality of a work is often challenged when the degree of a creator's contribution to a work is perceived as minimal. A classic example of this issue is Marcel Duchamp's 1917 work *Fountain*, a "ready-made" porcelain urinal placed upside-down on a pedestal that the artist contributed to the first annual exhibition of the Society of Independent Artists. While art experts assert that this particular piece is the most influential modern art work of all time,<sup>76</sup> it is debatable whether it is an original artwork for purposes of copyright protection, since the work merely consists of an already existing object.

What constitutes "originality" is also challenged in the realm of "appropriation art" or "cumulative creativity." This may be illustrated by cases where a creator develops a work from using, "quoting" or building upon elements from an already existing work for the purposes of creating a "new" work. "These might include images, forms or styles from art history or popular culture, or materials and techniques from non-art contexts."<sup>77</sup> One example is the work of Cory Arcangel, who radically slowed down the videogame *Tetris*®, originally created in 1984 by Alexey Pajitnov, of the then Academy of Science of the United Soviet and Socialist Republics (USSR) in Moscow<sup>78</sup> and claimed copyright in the new work.

"Originality" in the context of TCEs raises certain issues. Contemporary forms of TCEs made by current generations and inspired by or based upon preexisting indigenous or traditional art forms and practices can be protected as works, provided they are considered "original" under copyright law.<sup>79</sup> These are also forms of adaptations, or "derivative works," which are works based on one or more existing works. Examples include translations, motion picture versions of oral stories, and original reproductions of artworks.

While low thresholds for originality enable many artists to draw from their traditional artistic practices, it is also relatively easy for non-traditional and non-indigenous artists to produce knockoff works and argue that their products are original for purposes of copyright law.<sup>80</sup> In other words, copyright law's concept of originality does not distinguish between TCEs that are passed down within a community, as part of the conservation of culture, and the misappropriation of such TCEs by outsiders – both can be protected as original.

For an example of traditional art that was found to be protected by copyright, in a 1994 Australian case,<sup>81</sup> carpets were produced for the high-end market. These carpets reproduced the artwork of several prominent indigenous Australian artists. The carpets were being imported into Australia from Vietnam and sold with tags that labeled them as “Aboriginal carpets.”<sup>82</sup> Several carpets were direct copies of the original artworks, while others carried designs that had been significantly simplified and therefore were not direct copies. The Aboriginal artists argued that all of the carpets constituted copyright infringement. In arguing that the simplified carpets did not constitute original or derivative works, an additional argument was made that this copying was an infringement because it distorted the cultural meanings within the works.<sup>83</sup> The court accepted this reasoning and found that, under Australian copyright law, all the carpets infringed the copyright of the Aboriginal artists in their works.

Furthermore, under certain Aboriginal customary laws, the right to create artworks incorporating cultural narratives resides with the traditional custodians, guardians or holders, who are recognized by their people or community. These traditional holders have the collective authority to determine who may use the art forms and in what context or manner: they know the associated customary laws, values and protocols, for which they are responsible. Australian copyright law, on the other hand, does not provide a framework for the incorporation of Aboriginal custodianship.

The court noted these specific cultural dimensions: that because the community also had important relationships with the artworks, its members too had suffered anger and distress from the infringement. As a result, the court developed a new remedy for cultural harm wherein the copyright owners' injury and suffering was extended to include that experienced by their community.<sup>84</sup>

This case is important because the judge took into account how the infringing works, because of the simplifications and alterations done by the infringer, had disrupted and damaged the significant cultural meanings and narratives held within the original works by the Aboriginal artists and their communities.<sup>85</sup> This aspect is often referred to as “misuse” or “misappropriation” of TCEs and involves use which changes, distorts, reduces or inaccurately reflects the customary meaning, values and protocols associated with TCEs.

This example also illustrates how existing laws may be able to protect TCEs and fit the cultural context, but also how differently each jurisdiction is likely to handle these cases.

Another case concerning originality and likely to impact the activities of cultural institutions is the American case of *Bridgeman Art Library, Ltd. v. Corel Corp.*<sup>86</sup> In this case a court held that the photographic recreation of artworks in the public domain do not merit copyright protection. The court noted: “There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection... but “slavish copying,” although doubtless requiring technical skill and effort, does not qualify.”<sup>87</sup> The argument was made in court that

such reproductions would be protected under United Kingdom law. However, the final opinion noted that mention should have been made of the 1869 Graves case.<sup>88</sup> In this latter case, it was decided that:

*The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph. All photographs are copies of some object, such as a painting or statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of the statute.*<sup>89</sup>

The outcome of the *Bridgeman* case for United States of America copyright law is uncertain. It has been widely criticized and subsequent cases, even in the same jurisdictional district, do not necessarily seem to follow its precedent. Some have argued that Bridgeman's attorney neglected to challenge the claim that a photograph was a "slavish copy," and therefore not eligible for the same copyright protection as other creative works.<sup>90</sup> There is still some question, therefore, whether cultural institutions are able to own the copyrights in their photographs of public domain artworks.<sup>91</sup>

The *Bridgeman* case does not reflect international trends, however. During a case study seminar at the University of London (Queen Mary's College), an audience of arts professionals, IP attorneys, photographers and others reached the conclusion that the ruling should be reversed. Professor Adrian Sterling, Vice President of the British Copyright Council and author of *World Copyright Law*,<sup>92</sup> noted that the ruling would continue to be debated.<sup>93</sup>

One French court argued that the task of creating a faithful reproduction of a fountain requires skill but does not constitute original authorship;<sup>94</sup> another French court found that reconstituting a statue formerly at Versailles requires such a high level of proficiency and knowledge that the person who performs this must be an author;<sup>95</sup> an Italian court has argued that art restoration requiring a particularly sensitive and complex activity should reward the restorer with copyright protection.<sup>96</sup> In Switzerland, a recent case involving a 1997 journalistic photograph by Gisela Blau Guggenheim of Nazi-era documents supported a *Bridgeman*-like outcome. The photograph, taken and first published in Switzerland, was deemed by the Bundesgericht (the Swiss Supreme Court) to fall outside the scope of copyrightable protection due to its lack of originality.<sup>97</sup>

As concerns TCEs, photographic reproductions might or might not be copyrightable in and of themselves depending on the specifics of the reproductions and the process of their creation.

Many artworks in a cultural institution's collection, whether in the public domain or not, can often only be professionally photographed by cultural institution employees or contractors and, as such, the cultural institution has the ability to control the dissemination of those images through licensing agreements, digital rights management or other means.<sup>98</sup> This has been described as "curatorial control."<sup>99</sup>

From a pragmatic perspective, cultural institutions will likely not lose all of the revenue they may earn from photographs of public domain art because professional publishers require high quality images, which can only be captured with a professional photographer's expertise. So while the photographs may not be protected by copyright, the photographer will likely be able to sell them for their quality and fidelity to the original artwork, or TCE.

**KEY POINTS**

- Copyright protection extends only to expressions of ideas, and not to ideas, procedures, or methods.
- In order for a work to receive copyright protection, it must be original. The threshold for originality is usually not high. In the common law tradition, an author must contribute something creative; the work must exhibit more than mindless copying. In the civil law tradition, a work is original if it reflects or bears the mark of its creator's personality and/or personal creative talent.
- The originality requirement poses unique issues for TCEs. TCEs may be based on preexisting works either as contemporary iterations or as closely resembling creative works that have existed and been transferred from generation to generation. In the latter case, whether a given TCE has achieved adequate originality for copyright protection can be unclear.

***Database Protection***

Originality is certainly the *sine qua non* of copyright protection. As such, despite their importance and the efforts deployed to build them, databases sometimes receive very limited protection under many current copyright laws because they are, or can be, a simple “unoriginal” compilation of material.<sup>100</sup>

Under the Berne Convention and the TRIPS Agreement, databases constituting *creative* compilations enjoy protection under copyright as literary works. The term “creative” is not uniformly defined at the international level. For “creative” databases, it is generally the originality in arrangement or selection of material that is protected as a database, but never the material itself (which may be protected independently, and for which authorization is needed for inclusion into/use of the database).

Certainly, making an accurate and reliable database can be very costly and time-consuming, and some jurisdictions grant copyright protection based on the principle of the “sweat of the brow.”<sup>101</sup> For example, in 1996, the European Union promulgated a Database Directive, granting *sui generis* protection to databases made in the EU and in other countries that offer comparable protection.<sup>102</sup>

The owner of the rights in a database is generally the person who exerted his labor in compiling and organizing the information, not the people whose material (e.g., TCEs) are being documented in this way.<sup>103</sup> Ownership of rights issues arise if the database is incorporating a variety of other copyrighted works, such as films, or photographs. There are also over-riding questions about ownership depending on: who funded the project; whether the content itself is separately owned; and, whether the database framework is itself independently owned by another party, such as a specific technology developer. Resolving these questions *before* the database-making begins is very important. Concerns over the ownership of genetic databases, especially ones that contain information collected from indigenous peoples and traditional communities, illustrate the range of issues that can and will emerge in the future.<sup>104</sup>

Database protection is relevant to museum, library and archive professionals under a variety of circumstances. From image databases to invitation lists, cultural institutions “own” a great deal of valuable information.

In Belgium, a case explores some of the contours of databases and art history publication subsequent to Belgium's implementation of the EU Database Directive. In *Art Research & Contact v. S. Boas*,<sup>105</sup> the

plaintiff had collected and methodically arranged data regarding 530 sculptures in Brussels into a card system, in preparation for a book that the defendant was planning to publish. Before the book's completion, however, the defendant and plaintiff mutually agreed to discontinue their business relationship. The defendant subsequently used parts of the database to write and publish the book. According to the Court of Appeal of Brussels in a 2000 decision, the plaintiff's card system was protected by copyright, because the structure of the data compilation was the result of original selection and intellectual creation; the defendant was therefore found to have infringed the plaintiff's copyright. The Belgian Supreme Court confirmed the Court of Appeal's decision in 2001, but reiterated that, for noncreative databases, copyright protects merely the structure of the database, not the actual data itself.

Databases, registries and other forms of documentation are being considered as a mechanism to protect TCEs within the context of the negotiations taking place in WIPO's IGC.

Some worry, however, that making such a database, depending on its funding and management, would unwisely allow access to the very TCEs they are trying to protect. The collection, recordal and dissemination of and research on indigenous peoples' cultures raise multiple concerns for indigenous and traditional peoples. First, there is the possibility of breaches of confidentiality between ethnographers and informants (although professional codes of ethics proscribe these). Second, there is the possibility of the misrepresentation of indigenous and traditional cultures. Then, there can be the lack of access to documentary materials by the people about whom the research was conducted. And, finally, there is concern that much documentation of indigenous and traditional cultures is made, owned and commercialized by non-indigenous and non-traditional persons.<sup>106</sup>

Moreover, the digitization, dissemination and circulation of TCEs can be in direct antithesis to indigenous and traditional perspectives about how access to their collections is to be provided. In some cases, safeguarding efforts have unwittingly led to the unauthorized disclosure or commercial exploitation of culturally sensitive materials. Indeed, the informational content of an archive's collections might be sacred or confidential and subject to restricted use under customary laws. For these sacred, spiritual or otherwise culturally significant TCEs, access by third parties can be considered inappropriate by some communities. The handling of secret and sacred materials is thus a source of particularly acute concern. However, as Maui Solomon, a New Zealand lawyer, puts it, creating databases may be an interesting option "if, in the appropriate circumstances, public access can be effectively controlled. For example, by the use of "silent files" in which only the knowledge holders themselves or a duly authorized agency has access to that information for purposes of assessing whether or not a misappropriation has or is likely to occur."<sup>107</sup>

#### KEY POINTS

- Databases occupy an unclear space in copyright law. Each jurisdiction deals with them differently. While originality is required to receive general copyright protection, *creative* compilations may receive some benefits of copyright protection.
- Determining ownership of both the database itself, and its contents, is important to do before initiating a project that creates a database of TCEs.
- Some regional efforts are currently underway to create TCE databases. Such databases may be protected by copyright or *sui generis* database law.



### *Idea/expression dichotomy*

Copyright does not preclude others from using the ideas, systems, facts, concepts or information revealed in the author's work. It pertains only to the literary, musical, graphic or artistic *form* in which the author expresses ideas, information or other intellectual concepts. Copyright enables the author to control the copying or reproduction of the form in which he has expressed himself. For example, anyone is free to create his own expression of the same ideas and concepts, or to make practical use of them, so long as they do not copy or adapt the original author's form of expression. The division, or dichotomy, between "idea" and "expression" is sometimes difficult to apply in practice. Simply put, works that are comprised more of an *idea* than an *expression* of that idea, often fall outside the scope of copyright protection.

For example, French painter Georges Seurat's method of pointillism painting was emulated by others. The technique consists in small distinct points of primary colors creating the impression of a wide selection of secondary and intermediate colors. While it is most often Seurat's *style* or *idea* that places him in art history, rather than any particular painting or *expression* of that idea, copyright law only protects expressions of ideas. So while copyright could protect Seurat's paintings, including the famous *La grande jatte*, copyright could not protect the idea of pointillism, and Seurat could therefore not keep others from imitating his technique through copyright law.

A recent example is found in the case *Leigh v. Warner Bros. Inc.*,<sup>108</sup> an American case about the protectability of a photograph. Leigh was a photographer whose picture of the "Bird Girl" statue in the Bonaventure Cemetery in Savannah, Georgia, USA, was featured on the cover of the book "Midnight in Garden of Good and Evil." Warner Brothers made a film based on the book, and included another photographer's images of the same statue in the film and in promotional material. Leigh sued Warner Brothers for copyright infringement; the issue concerned the protectability of certain elements of the photograph and whether the defendant infringed on those elements. The U.S. Court of Appeals for the Eleventh Circuit emphasized that copyright law does not protect ideas and thus found that the original photograph did not entitle Leigh to prevent Warner Brothers' photograph of the same subject, in which Leigh had no rights. However the Court found that some elements of craft in Leigh's photograph such as selection of lighting, shading, timing, angle and film were protectable expressions.

In the context of TCEs, the idea/expression dichotomy plays an important role, because the distinction is often less certain. In the "Carpets case,"<sup>109</sup> it is clear that the indigenous artists were hoping to protect a range of intangible cultural elements that were also expressed in the artwork. Certainly, because the carpets misrepresented their works and did not respect the customary laws, values and protocols associated with them, the Aboriginal artists and their communities were offended.

Another reason is that the indigenous artworks are more than "artworks" in the western sense of the word. They are significant representations of important cultural stories, they are imbued with a diverse range of collective and often spiritual meanings, and their painting and display carries moral responsibilities.

What if the carpet manufacturers had learned the sacred stories upon which the artworks were based and thereafter created their own very different visual expressions of those stories on carpets? Such carpets could maybe constitute new copyright works, because their expression would be different from those made by the Aboriginal artists. One could argue, however, that an element of misuse or misrepresentation of the actual stories could still exist in this hypothetical scenario.



The problem of the idea/expression distinction in the context of TCEs is a recurring one. This tension also arises because there is no clear description, identification, let alone definition of what TCEs constitute: this is a necessarily open category that seeks to capture the diversity of indigenous and traditional cultural practices and expressions.

TCEs embody complex relationships between tangible and intangible elements, and these are not always easily translated into the language and logic of copyright law. As the International Publishers Association has noted in the negotiations on IP and TCEs within WIPO:

*The IPR system is a balanced system with clearly defined rights.... A presumption of freedom applies. For example: Idea/expression dichotomy of copyright. At the moment, expressions of culture are a relatively open concept that does not yet meet with the habitual rigor of clear definition and identification of what ought to be protected and what not.*<sup>110</sup>

There could be cases where the style or method of creating indigenous or traditional works would be employed by persons from outside the cultural context. In such a situation, existing copyright protection would not be available, since these cases involve the copying of an idea, a style or the method of making the work, as opposed to copying the actual indigenous or traditional work, or expression of the idea, itself.<sup>111</sup>

#### KEY POINTS

- The difference between an idea and the *expression* of that idea can be vague. No single rule can be clearly applied to represent a distinction between an idea and its specific expression. Such a distinction is made on a case-by-case basis.
- TCEs often straddle the idea/expression divide in that they embody beliefs, stories or thoughts (i.e., unprotected ideas under copyright law) that are quintessential to the culture; they oftentimes do not have one single, finite expression that overrides all other expressions of that idea.

#### Fixation

In some jurisdictions, protection will arise provided that such works are fixed in a tangible or material form that can be seen, heard or touched: this is referred to as the fixation requirement.

Copyright protection is available for both oral and written works.<sup>112</sup> The Berne Convention explicitly leaves the choice open as to whether works should only be protected if they have been fixed in some material form. Neither the WCT nor the TRIPS Agreement mention fixation.

A work will be fixed when it is sufficiently permanent to be perceived, reproduced or communicated, i.e., when it has a form of expression. This form needs not necessarily be graphic. Indeed, it usually does not matter whether the work is fixed in words, numbers, pictures, or any other medium: the form, manner, or medium of fixation is irrelevant. It may thus be written down, recorded, represented in digital data or signals or otherwise reduced to material form.<sup>113</sup>

Many national laws, particularly those of common law countries, do require fixation, because this may facilitate establishing the existence of the work and provide a clear and definite basis for rights. Conversely, many countries, in particular countries with a civil law tradition, in Africa, Latin America

(Brazil), and Europe (including Belgium, Spain, France, Switzerland, Italy and Germany)<sup>114</sup> do not require fixation. These countries accord protection to a work as soon as it is in a form in which others can perceive it.

The fixation requirement, perhaps more than originality and the idea/expression dichotomy, raises some serious challenges in the protection of TCEs, and particularly of intangible TCEs, under the copyright laws that comprise this condition.

For instance, “the shamanic incantations, complex therapeutic rituals, including poetics, healing performances in song or musicotherapy, sand painting, and so on, could often take spontaneous turns and not be readily amenable to representation in a tangible form.”<sup>115</sup> In many cases, it is impossible to separate TCEs “from the underlying and intangible symbolism, spiritualism and belief systems that fixation entails. A prayer, for example, when expressed in a written material, could be the subject of a copyright under the Berne Convention, Article 15(4)(a). Nonetheless fixation detracts from the deep, personal, emotive and spiritual power of prayer that is fully realized in the context of individual or group specificity, ecstasy, seeming spontaneous outbursts, or the like.”<sup>116</sup>

#### KEY POINTS

- Many, but not all jurisdictions require that a work must be fixed in a tangible or material form in order to receive copyright protection.
- Many TCEs would not meet the fixation criterion. Oral stories and dances, for example, could not, in such cases, be protected if not specifically “fixed” in material form.

### *Adaptations*

Adaptations are works based upon one or several preexisting work(s) or upon material from the public domain. They include any form in which a work may be recast, transformed or adapted. These adaptations are sometimes referred to as “derivative works,” for they “derive” from preexisting works or unprotected material. The derivative work may in turn qualify for copyright protection if sufficiently original.

An author, or rights owner, has the exclusive right to control the making of adaptations of his protected work(s). A third party wishing to create a work based upon a protected work needs the authorization of the author of said protected work.

Even works derived from materials in the public domain can benefit from copyright protection, because a new interpretation, arrangement, adaptation or collection of public domain materials, or even their “re-packaging” in the form of digital enhancement or colorization, can sometimes result in a new distinct expression which is sufficiently “original.” For example, the script for a film based upon a well-known ancient work, such as Homer’s *Odyssey*, may be original.<sup>117</sup> In addition, two very similar-looking works may both have had their basis in the same work or body of work that is in the public domain.

For this reason, a contemporary literary or artistic production derived from or inspired by traditional culture, or a particular TCE, that incorporates new elements or expressions may be considered a distinct, original work and can thus be protected by copyright.

However, the protection afforded to such derivative works vests only in the new material or aspects of the derivative work. This is sometimes referred to as “thin copyright.” This phrase is used to refer to the thin layer of protectable elements in an otherwise unprotectable work, where the remaining elements are protected as copyright of another author or are in the public domain. The copyright or public domain status, as the case may be, of these preexisting elements or material is unaffected. The idea is that although an adaptation may be copyrightable, it cannot serve to either take something out of the public domain that was already in the public domain, or diminish an earlier author’s rights.<sup>118</sup>

While a copyright owner’s exclusive rights normally include a right to authorize or prevent the adaptation of his work, this does not generally prevent other creators from being inspired by the work or from borrowing from it. Copyright supports the principle that new artists should build upon the works of others and it rewards creativity.

The challenge is to distinguish between the unlawful copying or unauthorized adaptation and legitimate inspiration or borrowing.

Discussions about a possible *sui generis* protection of TCEs touch on whether or not to grant a right of adaptation in respect of TCEs, and on the exceptions and limitations that might be appropriate.<sup>119</sup>

As exceptions and limitations will differ within each context, Part III outlines a range of ongoing projects establishing good practices when working with indigenous and traditional communities around access and use of TCEs, both within institutional contexts and within traditional communities.

#### KEY POINTS

- Adaptations are works based on one or several preexisting work(s) but with enough original elements to create a newly copyrightable work. Under copyright law, the challenge is to differentiate between unauthorized adaptation and lawful inspiration or borrowing.
- TCEs could often be classified as derivative works since they are based on preexisting expressions. A potential problem with simply classifying every new iteration of a TCE as a derivative work is that it would not serve the purposes of a community and would allow each TCE iteration to eventually fall into the public domain and thus be available for use by anyone.

#### *The public domain*

The Berne Convention applies to “all works which, at the moment of [the Convention’s] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.”<sup>120</sup> “Public domain” is a sometimes confusing term that is not used uniformly. Some jurisdictions do not use the term “public domain” at all; Japan, for example, uses “copyright-free” for this concept.

Contrary to some current perceptions, a work is not in the public domain simply because it is accessible, for example, on the Internet. With the advent of the Internet, it became possible to “post” protected works freely and easily. Once such material is available online, it may be perfectly copied among thousands or even millions of computers very quickly and essentially without cost. This perhaps intensified an already established but incorrect belief that, if something is available through a free and open source, it must be in the public domain. The Internet actually holds an enormous amount of protected works. There is a big difference between “publicly accessible” and “public domain.”

Generally, the public domain consists of every intellectual product *that was never or no longer is* under IP protection. Its definition and usage can thus only be understood in relation to what is and what is not protected under IP laws.

The public domain is an important concept for cultural institutions to understand. This is because the materials in the public domain are free to be used by anyone for any purpose. Cultural institutions are free not only to reproduce material from the public domain on the Internet but also on commercial goods and for commercial purposes.

Institutions often have different strategies for managing public domain material. For example, the online “Webmuseum” attempts to limit access to digital reproductions of works of Swiss artist Paul Klee (1879-1940). To access a Paul Klee work online, the Internet user must certify that the work is in the public domain in the country and jurisdiction where it is about to be imported.<sup>121</sup>

Physical institutions with an online presence often select the artworks that they display digitally,<sup>122</sup> or, if their websites provide a searchable database, they may simply not display works that are not in the public domain and/or for which they have not received permission to digitize or display online.<sup>123</sup>

The term “public domain” is most often used to refer to intellectual material in which no one can establish or maintain proprietary interests. As already discussed, this is problematic in relation to TCEs as many traditional communities maintain communal, familial, and/or clan rights, responsibilities and interests, but these are not necessarily recognized within legal frameworks that regulate and define “property” and “proprietary interest,” including the IP framework.<sup>124</sup>

Most TCEs that are not protected by a *sui generis* or other type of IP law are in the public domain and open to undifferentiated use (subject to potential related rights in their recording, performance, or broadcasting).

The concept of the public domain does not take into account the different rules established by customary laws and the function of TCEs within indigenous and traditional communities. Some communities have expressed concern about the concept of the public domain in relation with their TCEs.<sup>125</sup>

For example, in Sardinia, Italy, different villages have distinctive ways of singing the multipart *al tenore* genre that is recognized both within the villages and by other villages as representing a specific village. Potential for exploitation by arrangers who take the “public domain” traditional music and arrange it for their own profit without recognition of the original is very present.

There are views, however, according to which the concept of the public domain offers possibilities for the ongoing protection and promulgation of TCEs.<sup>126</sup> “It serves several of the objectives associated with the safeguarding and preservation of cultural heritage, and it is argued that the public domain character of cultural heritage is essential for its renewal and survival.”<sup>127</sup>

For example, literature that links TCEs with the broader cultural heritage debate often draws connections to such international instruments as the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970);<sup>128</sup> the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003); the UNESCO Convention on

the Promotion and Protection of the Diversity of Cultural Expressions (2005) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995).<sup>129</sup>

Furthermore, there is a view that if TCEs were removed from the public domain, they would run the risk of not being able to “evolve and [would] risk [their] very existence as [they] would lose one of [their] main features: [their] dynamics.”<sup>130</sup>

#### KEY POINTS

- Material that is not covered by copyright, either because it does not meet the criteria for copyright protection or because its copyright term has expired, is said to belong to the “public domain.”
- Publicly “accessible” is not equivalent to public domain; in other words, being able to view a reproduction of a TCE on the Internet does not mean that the TCE is in the public domain (i.e., free of copyright).
- TCEs have a difficult relationship with the public domain; they neither fit neatly into the category of copyrighted works nor, arguably, should they necessarily be available and usable for any purpose. Indigenous peoples and traditional communities do not necessarily accept the notion of a public domain.

## 2. Authorship

Copyright law recognizes the “author” and “authorship” in ways different from which indigenous peoples or traditional communities might understand these notions. Indeed such notions are culturally specific; they emerged in Europe in the 17<sup>th</sup> and 18<sup>th</sup> century.<sup>131</sup> They cannot necessarily be easily mapped onto indigenous or traditional understandings of cultural practice and cultural products.

For example, if a film is made of a traditional ceremony, the “author” is the person who makes the film. This understanding is often in direct antithesis to indigenous and traditional ones, where the “author” (if that term is used at all) may be an individual within the community who is responsible for the information contained within the ceremony or it may be a clan, as a whole, that has responsibility or authorship in the ceremony.

Under copyright, however, TCEs are often seen as works of “unknown authors.”<sup>132</sup> This highlights the extent of missing information within TCE collections. Acquiring this missing information is difficult and not always possible. This is part of what makes these collections unique and sensitive.

This uneasy situation is due to the fact that, in the past, when TCEs were being recorded and documented by non-indigenous or non-traditional people for the purposes of study – either ethnographic, folkloric, anthropological, scientific, or sociological – very few names of individuals were noted down and the use of pseudonyms was common. This information was often seen as irrelevant.

It should be noted, though, that in the past 30 or 40 years, ethnographic collecting practices and protocols have evolved and improved. Release forms, permissions, and informant contact information sheets are now systematically obtained at the time of the collecting. Without these documents, most cultural institutions are unable to accept the collection, as they would be unable to provide researchers with access to the material.

Furthermore, certain attempts have been made to address the “authorless” nature of some works. Article 15(4) of the Berne Convention stipulates that countries may legislate to designate a competent authority to represent unknown authors in the case of “unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union.”

For the management of TCEs, it should not be assumed that they are authorless. Many indigenous peoples and traditional communities know and can identify who the individual creator or maker of a particular TCE is or was, even long after he has passed away. For many of the very old TCEs, the author is still known by the community. There are some cases, nevertheless, where the particular expression can be distinctly recognized as coming from a certain people, community, or region, due to the particularities of the art form or the material used, but where the actual individual creator is unknown.

### ***Orphan works***

Under copyright law, “orphan works” are works whose right owner cannot be located or identified.

Some jurisdictions, such as Canada, have implemented legislation that creates a compulsory licensing scheme allowing for the use of published works to be issued by the national copyright authority on behalf of non locatable copyright owners.<sup>133</sup>

The United States of America and the European Union are currently looking into similar legislation although there are several difficulties that need to be addressed, including a definition of “orphan work;” a defined threshold for the reasonable diligence that a hopeful user should use to search for an author; and the status of TCEs in this framework.

The European Commission has put together a high-level expert group on the issues of digital preservation, orphan works and out-of-print works to address some of these issues in the European context. For literary and audiovisual works, the group concluded that a solution to the orphan works issue is desirable, whether it be via legislation or non-legislative solutions, including dedicated databases concerning information on orphan works; improved inclusion of information on rights owners within digital material; and enhanced contractual practices.<sup>134</sup>

Some specific proposals include:

- An in-depth investigation to identify the copyright owner before the work is considered “orphan”;
- Any reasonably diligent search should necessitate a high level of care;
- Anyone intending to exploit an orphan work would need to be able to demonstrate significant effort in tracing the copyright owner; and,
- The notion of diligent search should consider several elements: the type of orphan work, the type of exploitation envisaged, and the type of user.

### ***Orphan works in the TCE context***

The orphan works issue has a specific set of ramifications for TCEs. Due to the way indigenous peoples and traditional communities have historically been represented by outsiders, their TCEs have been understood as productions which never had an “author” or “performer” in the copyright and related rights sense and cannot, therefore, be “orphaned” as so defined in law. Without a specific author to

associate with a specific expression, TCEs would not be able to benefit from the protective regime put in place for orphan works.

An orphan work must first be considered copyright subject matter. It can be difficult to determine whether, for example, a cultural symbol, dance or handicraft is a TCE not protected by copyright or, alternatively, an orphan work, i.e., a work protected by copyright but whose right owner is unknown or cannot be located.

Moreover, orphan works legislation often allows for the public to access, change, display and otherwise use the works in question after a diligent search has been performed. This is likely to be problematic for many indigenous groups and traditional communities.

It may be possible to argue that a given copyright-protected TCE (be it a symbol, a narrative or a handicraft) is “orphaned” and therefore subject to a country’s legislation that addresses unidentifiable owners. From an institutional perspective, this could make TCE collections easier to manage. However, this would likely perpetuate institutional and governmental control over the collections – a problem that has meant that tradition-bearers have had trouble accessing and asserting their rights and interests in relation to the development of appropriate forms of management that the collections require.

While there are not yet many examples of how the orphan works issue collides with access, use and control of TCEs, it does raise specific concerns, and these should be kept in mind as countries implement orphan works and/or TCE legislation.<sup>135</sup>

It may be useful to consider a risk-management approach for managing orphan works.<sup>136</sup> Three key questions that a risk management policy may consider include what steps cultural institutions should take to identify a copyright owner; what steps it should take to contact that person or entity; and what happens if it is not possible to identify or locate the copyright owner.

#### KEY POINTS

- An “orphan work” can be described as a copyrighted work whose copyright owner is unknown or not locatable. Some jurisdictions are currently considering implementing legislation that would allow the public to use these works once a reasonable search for the copyright owner has been undertaken.
- TCEs, whose nature is often not to have one author but rather to be attributable to a cultural group, could potentially be adversely affected by “orphan works” legislation: a potential user could claim that, after a diligent search, he could not locate the copyright owner and could therefore use the TCE for whatever purpose he chooses.

### 3. Duration of Protection

A central tenet of the copyright system is that the term of protection is not indefinite; works ultimately enter the public domain. The Berne Convention and the TRIPS Agreement stipulate 50 years *post mortem auctoris* (after the death of the author) as a minimum period for protection, although countries are free to protect copyright for longer periods.<sup>137</sup> In other words, any State signatory to the Berne Convention or the TRIPS Agreement must provide the “life + fifty” term of protection but is permitted to extend it. For example, Mexico permits one of the longest durations of copyright: copyright lasts for the life of an author plus 75 to 100 years, dependant upon an array of factors.<sup>138</sup>

Moral rights also obey terms of protection, and this varies from country to country. They may be perpetual, have the same duration of economic rights, or end with the life of the author.

There are a few exceptions to this basic rule of duration. For example, royalty rights from use of the famous work “Peter Pan” subsist in perpetuity under United Kingdom copyright law for the benefit of a charitable cause,<sup>139</sup> and a proposal was put forward in 2003 in Australia to grant perpetual protection for the artwork of indigenous artist Albert Namatjira.<sup>140</sup> These examples show that the central principle of limited duration, essential to the copyright balance, may, albeit very rarely, be twisted to accommodate certain specific situations.

Understanding the copyright duration equation is vital for all institutions working with 20<sup>th</sup> and 21<sup>st</sup> century artists and their works. Knowledge about whether a work is protected or has fallen into the public domain matters because artists will have a range of rights concerning, *inter alia*, the display, reproduction and, depending on the jurisdiction, arrangement of their artwork.<sup>141</sup>

The determination of the status of a work (whether it is protected or in the public domain) requires research and calculation. Different jurisdictions have a range of specific duration “calculations.” These calculations often depend on the medium of the work,<sup>142</sup> whether the applicable copyright act is retroactive,<sup>143</sup> and whether the work is authored solely, in collaboration with others<sup>144</sup> or under the auspices of an institution, among many other considerations.<sup>145</sup> It is likely that a cultural professional will have to become familiar with the current national copyright law, with former laws that were in place at the time of a given work’s creation and/or publication and with laws of many other jurisdictions.

Given the intergenerational nature of TCEs, it is argued that no finite term would be appropriate for their protection. Many indigenous peoples and traditional communities would like to see indefinite or infinite protection for at least some expressions of their traditional cultures. Calls for indefinite protection have also been linked to calls for retroactive protection.<sup>146</sup> Some tradition-bearers have expressly sought to enforce copyright protection for certain symbols and other TCEs. These protected manifestations of the TCEs will eventually fall into the public domain, unless special legislation is enacted, as in the above-mentioned cases of “Peter Pan” and Albert Namatjira. In the context of the WIPO negotiations, the Hokotehi Moriori Trust paid special attention to the question of term and pressed for an instrument that would provide for protection in perpetuity since TCEs “continue to be integral to the maintenance of the culture and identities of the indigenous peoples concerned.”<sup>147</sup>



**KEY POINTS**

- Countries provide for different terms of copyright protection. The minimum term of protection, as stipulated in the Berne Convention and the TRIPS Agreement is the life of the author plus fifty years.
- Cultural institutions need to pay special attention to copyright terms, especially if they hold works from different jurisdictions.
- Some believe the limited duration afforded by copyright protection is inadequate for TCEs and that protection in perpetuity is the only solution. Others argue that the public domain is the appropriate repository for TCEs and that a limited period of protection is thus appropriate for TCEs. This is an ongoing policy debate.

## 4. Economic and Moral Rights

Copyright laws vary from jurisdiction to jurisdiction. One of the most prominent differences is the degree to which copyright protects the economic and moral rights – if any – of an author

### *Economic rights*

The owner of copyright in a protected work may use the work as he wishes (to the extent that his rights do not conflict with those of others) and may exclude others from using it without his authorization.

The exclusive economic rights generally include the rights to, *inter alia*, copy or reproduce, (which sometimes include the right to distribute), adapt, perform in public, make a sound recording, broadcast, display and communicate to the public the work.

Exclusiveness is, however, limited. Certain uses may be made of the protected work without having to obtain the prior authorization of the copyright owner, sometimes for free, sometimes provided a fair or reasonable payment is made: these are referred to as exceptions and limitations, which will be dealt with later on in this section.

### *Moral rights*

Depending on the jurisdiction,<sup>148</sup> an author also enjoys certain moral rights, which are enshrined in Article 6*bis* of the Berne Convention. Moral rights generally include the right of attribution or paternity (the author has the right to claim authorship, to have his name stated or printed with the work), the right to the integrity of the work (the author has the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work which would be prejudicial to the author's honor or reputation), the right of publication (wherein the author is the sole judge as to when and whether the work may be made available to the public), and the right to withdraw or retract (also referred to as the right of renunciation).<sup>149</sup> Moral rights may also include an author's right to associate, or not, with specific products, services or causes, the right to remain anonymous, and the right to use a pseudonym.<sup>150</sup>

It should be noted that moral rights, just like economic rights, only apply to protected works. Moral rights vest in the work's author. In some jurisdictions, moral rights are inalienable, i.e., they cannot be

transferred to another person or legal entity; they remain with the author even when he has licensed or assigned his economic rights to a third party. However in some jurisdictions moral rights may be waived.

In some jurisdictions, moral rights are only applicable to certain categories of works. For instance, in the United States of America, only works of visual art (for example, paintings, drawings, print, sculptures, or photographs) may benefit from the rights of attribution and integrity.<sup>151</sup>

Through moral rights, the author can impose limitations or requirements on what others, including cultural institutions, can do with the work. Even though cultural institutions may have physical ownership of a protected work, this procures insufficient legal grounds for several uses of said work. This can range from the way in which an artwork is presented; to separating an artwork from its intended whole;<sup>152</sup> to painting a sculpture a different color;<sup>153</sup> to removing a sculpture from the spot for which it was commissioned and where the artist meant it to remain.<sup>154</sup> As concerns TCEs, this could involve, for example, a sacred design being copied on a carpet, which people could walk on.

For cultural institutions, moral rights yield benefits and responsibilities. They promote artists' authority over their own creations; nevertheless, ongoing care must be taken in relation to the use of a work in order not to breach an author's moral rights.

In the TCEs context, the concept of moral rights (at least conceptually) has the potential to address concerns relating to cultural offense, misuse, and misrepresentations of TCEs and may be a means to ensure respect, recognition and protection of authenticity and integrity.<sup>155</sup>

In one case involving TCEs, moral rights have been invoked. In the context of the Sydney Olympic Games of 2000, the Olympic Museum in Lausanne posted on its website three Australian Aboriginal artworks, which were intended to be downloaded as wallpapers, without seeking permission from the artists. The artists considered this act offensive, given that the artworks were important cultural works which also related to their land knowledge. Upon hearing their complaints, the museum removed the artworks from the website and entered into negotiations regarding possible copyright and moral right infringements. These discussions culminated in a settlement agreement, which saw the artists receive money for the infringement as well as a letter of apology signed by President of the Olympic Museum Foundation, acknowledging the infringement and apologizing for cultural harm.<sup>156</sup>

When digitizing their collections, cultural institutions should bear in mind moral rights. For example, a digital copy of a work can be seen in a number of different formats on the Internet; universities, poster shops and enthusiastic travelers have captured famous paintings digitally. As can be expected, however, the intensity of pixels, color replication and general quality of images vary greatly. An author may object to a reproduction in poor quality, which would violate his right against distortion or derogatory treatment.

As far as TCEs are concerned, image quality may play an important role. It may be viewed as culturally offensive to display a TCE except as the most faithful reproduction or, conversely, except as a thumbnail so that certain spiritual symbols cannot be made out except upon an in-person visit or with permission of the relevant community. Generally, a thumbnail version of a TCE could not be authorized under an exception or limitation, since even the disclosure of the rough parameters of a TCE image is often enough to cause harm and/or damage. There is likely no single type of guideline that will work well for all cultures or all types of TCEs, therefore each cultural institution may need to develop its own management frameworks according to its collections.

In certain countries, this concept has been seen to work. For example, Section 28(3) of the Nigerian Copyright Act<sup>157</sup> states that “in all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, and in conformity with fair practice, by mentioning the community or place from where the expression utilized has been derived.” This provision essentially provides for recognition that the work derives from a collective or community context.

Despite the innovative nature of this law, the Nigerian experience has left a number of issues unsettled. The TCEs of different communities can be very similar: songs, crafts or paintings are often shared by or common to several of Nigeria’s regions, and identifying and attributing a TCE to a specific group can present a challenge.<sup>158</sup> An additional difficulty is the extent to which some expressions, while they may resemble each other in appearance, actually have different cultural customary laws, functional values and significations in their associated communities. What is more, the Nigerian Copyright Commission has the sole right to authorize use of TCEs; there may thus be contexts where granting permission for use may be acceptable to one community but offensive to another.

Another example is that of the 2003 Australian Government Indigenous Communal Moral Rights (ICMR) Bill to protect the cultural interests of indigenous communities. ICMR was considered to be a possible tool for indigenous peoples to prevent derogatory treatment of works drawing on their traditions, customs and beliefs. The goal was to entitle indigenous peoples to “take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material,” and to give the peoples “legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom.”<sup>159</sup> Aspects of the proposed draft Bill were criticized by indigenous people and other interest groups. While the idea of the Bill remains active, it has not yet been passed.

#### KEY POINTS

- Copyright laws provide economic and moral rights. The economic rights relate to the exclusive rights of prohibiting and authorizing use of their works. Moral rights relate to the non-economic, personal or artistic interest of the author in the work.
- Copyright owners have the right, *inter alia*, to control the reproduction of their works; the public performance of their works; the recording of their works; the communication to the public of their works; and the translation and adaption of their works.
- Some communities wish to claim and exercise IP in their TCEs to enable them to exploit them commercially. The copyright system is intended, in essence, to permit the commercial exploitation of creative works in as fair and balanced a manner as possible.
- Many TCEs are created primarily for spiritual and religious purposes and not to reach as broad a public as possible. These are often not meant to be exploited economically therefore economic rights might be completely inappropriate.
- Many indigenous peoples and traditional communities are interested in protecting the integrity and authenticity of their TCEs solely or in addition to the ability to profit economically from them. In such circumstances moral rights might be considered more important than economic rights.

### **Resale rights**

Resale rights (*droit de suite*, in French) are a bundle of rights that allow an artist (or his heirs) to receive a percentage of the sale price of his work of art when it is resold by an art-market professional (auctioneer, gallery or other art dealer; private sales are usually excluded). The goal is to allow artists to reap financial benefits from the resale of their works as they increase in reputation and value.

Resale rights are provided at Article 14<sup>ter</sup> of the Berne Convention. They are recognized in some 50 countries, including many countries in Latin America and Africa. Switzerland and the United States of America, however, do not recognize resale rights, but the American State of California does.<sup>160</sup>

The resale right is usually limited to works of graphic art or plastic art such as, for example, pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs.

France was the first country to introduce such rights. "The French Government introduced a scheme to protect the right of resale in 1920, after controversy over artists living in poverty, while public auction houses were profiting from the resale of their artistic creations."<sup>161</sup>

The European Union issued a specific directive in 2001.<sup>162</sup> This directive requires each EU member to enact legislation giving artists a right to a percentage, (calculated through a sliding scale), of the profit made on the resale of their works of art (graphic or plastic arts) for a period of their lifetime plus 70 years.<sup>163</sup>

Resale royalties are potentially significant for indigenous and traditional artists because of the difficult economic conditions in which many indigenous peoples and traditional communities live. It is perceived as a sad and unfair irony that many traditional artists live in poverty, while their works are being resold for thousands of dollars at auctions and in galleries on the global art market.

For example, Tommy Watson is an Australian Aboriginal artist whose works are selling for significant sums of money.<sup>164</sup> Watson's 2006 painting *Waltitjatt* sold for \$197,160 at a recent auction sale in Sydney. Watson travels between Irrunytja, a small community of 150 people, and Alice Springs, a regional center. Watson reportedly receives approximately \$1000 per painting from a local art gallery.<sup>165</sup>

Other examples include a Torres Strait Islander (Australia) drum sold for €818,400 at Christie's Paris in 2006; this was a world auction record for a drum.<sup>16</sup> A Blackfoot Beaded Hide Man's wearing shirt sold at Sotheby's New York for \$800,000; indeed, "Sotheby's October 2006 sale of American Indian art achieved a total of \$7 million and...also set a new world's record for the sale of a Native object...a Tsimshian face mask sold for \$1.8 million. The sale was white-glove which means every lot was sold."<sup>16</sup>

Yet another example is the traditional potters of north Georgia, in the United States of America, which have been making unique "face jugs" for generations. A face jug that was made by deceased traditional artist Lanier Meaders would be worth many thousands of dollars today, an astronomical increase in value from when it was created in the 1950s.

In Australia, the debates have been particularly intense given the sharp upward shift in the value of Aboriginal artworks.<sup>168</sup> In November 2008, the Australian Government introduced the Resale Royalty for Visual Artists Bill 2008 and legislation to introduce a resale royalty right scheme to ensure Australia's visual

artists receive a portion of the proceeds from the resale of their works was passed by the Senate in November 2009. Under the scheme, artists receive five per cent of the sale price when original works are resold through the art market for \$1000 or more. The resale royalty right applies to works by living artists and for a period of 70 years after an artist's death. The scheme covers original works of art, such as a painting, a collage, a drawing, a print, a sculpture, a ceramic, an item of glassware or a photograph.<sup>169</sup> Under this scheme, indigenous artists will start receiving some return from the exponential growth in an art industry that is wholly dependent upon them, but that provides limited economic return to the individuals and communities who are the creators.

#### KEY POINTS

- The resale right is a mechanism whereby an artist (or his heirs) can recuperate some of the sale price of his creations even after having sold them to third parties; it is applicable in some jurisdictions.
- Some argue that indigenous and traditional artists could benefit from the resale right. It could provide economic return.

## 5. Exceptions and Limitations

Copyright regimes provide for exceptions and limitations to the exclusive rights of copyright owners that allow for certain uses without the authorization of the copyright owner, either for free or against payment. Examples of exceptions include: reproduction of a work for purely personal and private use of the person making the copy; making quotations from a work; use of a work for purposes of reviewing, criticizing or parodying it; and, reproduction of a work for the purposes of archival preservation. Further examples include:

- copying – for the purposes of criticism, review, news reporting, research or private study;
- limited copying for particular educational purposes in specific circumstances;
- limited copying by librarians or archivists in specific circumstances; and
- recording a television program for the purpose of making a complaint or watching it at a more convenient time.

The list of permitted acts under copyright law varies from jurisdiction to jurisdiction though, and TCEs' geographic location could be the decisive factor in determining whether a use is considered legal or not.

The United States of America, for example, has incorporated the formerly judge-made doctrine of "fair use" in its Copyright Act.<sup>170</sup> Whether a use is "fair" is tied to four factors,<sup>171</sup> although the degree to which one may rely on those factors or the weight which any single factor is given in a specific circumstance are rarely, if ever, predictable. In litigation, once a plaintiff has proven that a defendant has committed an infringing act, the defendant then bears the burden of proving that his copyright should nonetheless be excused as a "fair use."

A well-known American case, *Rogers v. Koons*,<sup>172</sup> demonstrates that copyrighted works can not be so closely mimicked or parodied that the original work loses its meaning. In this case, Jeff Koons, a famous American artist, was found liable for copyright infringement as a result of creating a sculpture entitled *String of Puppies* which recreated the plaintiff's photograph. The court stated that Koons' sculpture infringed the photographer's copyright because Koons copied his composition, poses and expressions.

The fair use defense failed as Koons had claimed his aim was to parody a type of culture in its entirety as opposed to the specific photograph.<sup>173</sup>

In contrast to the US concept of fair use, United Kingdom law incorporates “fair dealing” in its copyright regime as a specific list of actions that are explicitly non-infringing.<sup>174</sup> Other jurisdictions use other terms; Swaziland’s draft copyright law, for example, refers to “free use.”<sup>175</sup>

Many, if not most, jurisdictions handle exceptions and limitations differently. In the civil law tradition, countries designate specific types of uses that are permitted. The European Community Information Society Directive of 2001<sup>176</sup> provides a framework for exceptions and limitations.<sup>177</sup> In France, for example, the Intellectual Property Code enumerates the specific circumstances under which authors must cede their rights to the public.<sup>178</sup>

In some jurisdictions, exceptions are very limited. For example, until recently in Australia it was considered copyright infringement to copy, reproduce or adapt copyright material for personal or private use without permission. Only a very short menu of actions was allowed under Australian fair dealing, including review or criticism; research or study; news-reporting; and lawyers’ business.<sup>179</sup> With new legislation in 2006, Australia added several private copying exceptions, making it no longer an infringement to: record a broadcast in order to watch or listen to at a more convenient time; make a copy of a sound recording for private and domestic use; and make a copy of a literary work, magazine, or newspaper article for private use.<sup>180</sup> Australia now also has a special division of exceptions applying to artworks in public places (to allow photography, incidental filming, etc.) and statutory, compulsory licenses that allow use by schools, universities, and others on payment of a license fee.

As another example, in South Africa, reproduction of a literary or musical work is permitted for the purposes of research or study – or the personal or private use of – by the person using the work; for purposes of criticism or review of that work or of another work; and for the purpose of reporting current events in a newspaper, magazine or similar periodical or by means of broadcasting or in a cinematographic film.<sup>181</sup>

### ***Exceptions and limitations in the TCE context***

For TCEs, exceptions and limitations engender, again, a new set of issues. For the secret, sacred, spiritual and otherwise culturally-significant nature of TCEs, even use of a TCE as a teaching tool can be considered inappropriate. For certain indigenous peoples and traditional communities, any revelation of specific TCEs is punishable conduct under customary law.

For example, a college professor in New Mexico, United States of America, has been banished from Taos Pueblos by his own Native community for having written and published a paper about a spiritual tribal dance. His order of banishment from the community states that he “caused irreparable harm to the sensible nature of the religious activity through exploitation.”<sup>182</sup> Under copyright law, the professor’s actions are acceptable: he was creating a new expression (his paper) from knowledge he had about a Native community. To the tribe whose dance was publicized and described without authorization, fair use was not the appropriate framework for judging appropriate use. The community itself had its own rules of access, use and dissemination and these were not followed, and the Professor was sanctioned.

In a cultural institution setting, with an emphasis on broadening the understanding and appreciation of culture, exceptions and limitations play an important but uncertain role for TCEs.

For example, the Division of Anthropology at the American Museum of Natural History in New York has created an access policy for the public that clearly takes into account the exceptions and limitations imposed by copyright law and that distinguishes uses that fall under such exceptions and limitations, and those that do not. The policy stresses that very limited photocopy orders can be handled by mail, and that any sustained engagement with their archival resources requires an on-site visit which requires permission from the curatorial staff.<sup>183</sup> The Division further stipulates that permission to photocopy “is determined by the condition of the documentation and the nature of the individual project. Photocopied material is made available for research purposes only. Clearance for any other use, including publication, electronic transmission, general distribution or commercial use must be secured from the Division by submitting a written request to the Chairman.”<sup>184</sup> With regard to photographing the collection, visitors may take photographs of the collections “for record purposes” for personal use only. Again, permission for any other use must be made via written request.<sup>185</sup> It may be wondered why tradition-bearers are not consulted concerning such requests; in fact, in many cases, they are not the copyright owners.

At the Musée du Quai Branly in Paris, 3,500 artifacts in the permanent collection are presented “so as to highlight the historical depth of the cultures that produced them, and the many different meanings that the works themselves possess.”<sup>186</sup> While the physical collection of these varied and culturally significant artifacts has been contentious, the positive and negative effects of providing an online presence also stir up IP questions with difficult answers.<sup>187</sup> The museum’s “legal notes” webpage details the ways in which the images and text on the museum website may be used following France’s Intellectual Property Code.<sup>188</sup> For indigenous and traditional communities who would prefer that their TCEs be exhibited in a different context – if at all – France’s copyright exceptions and limitations do not necessarily provide for such possibilities. But indigenous peoples and other tradition-bearers want to be involved in decisions about the appropriate ways of exhibiting works, and this includes questions about authorizing use, by whom and to whom.<sup>189</sup>

Another example is that of the Colorado River Indian Tribes Library & Archive, founded in 1958. The Tribal Public Library/Archive serves as a research center for those wishing to study the culture and history of the four tribes of the reservation. The Tribal Archive has been delegated by the Tribal Council to preserve and maintain the culture and traditions of the Colorado River Indian Tribes. The Tribal Archive consists of original written documents, copies of documents, microfilm, photography, videotape and oral history tapes. Included is personal correspondence, federal government documents and works of historians, ethnologists and anthropologists. The Tribal Archive is accessible to tribal members only. Non-Tribal members have to file an application for the use of archival materials and must agree to abide by the rules governing the use of these. The rules are not made publicly accessible by the Archive. Director Amelia Flores applies a disclaimer to “problematic” acquisitions and “derogatory labeling” in the holdings of the Library/Archive, which states: *We do not endorse this publication*.<sup>190</sup>

Cultural institutions are often endowed with the artworks or recordings of individuals and communities, some of whom are alive and contemporarily prominent, others are unknown or deceased. Whether a cultural institution may display, reproduce and/or make a profit from various types of reproductions of an artwork or recording depends on several factors, some of which are laid out below.<sup>191</sup>



Exceptions and limitations are dealt with differently in the world and even within a single jurisdiction legal predictions are difficult if not impossible. Under such circumstances, it may be important for a cultural institution to develop a risk management strategy that takes into account the possible issues that may arise.

The extent to which the use of a work is allowed under an exception is an ongoing issue because there are no hard and fast rules. While direction can be taken from court decisions, these are often decided on the particulars of each case. From producing catalogs to making exhibition posters and event invitations, whether a copyrighted work can be made part of that new work without obtaining permission from the copyright owner is often questionable.

Cultural institutions holding the copyright in some of their works (especially those embodying TCEs) would benefit from understanding whether they can or should be charging licensing fees for third parties wanting to use images from their digital collections for “coffee table” books, textiles, in films and in other commercial products.

### ***Preservation, restoration and administrative uses of TCEs***

Many professionals at cultural institutions are responsible for archiving ethnographic images, audio and video recordings, or posting information on the Internet and, as such, need to be familiar with the good practices for archiving, digital imaging and scanning technology.<sup>192</sup> New technology has collapsed the distinct acts of accessing a work, using a work and copying a work. For example, in the digital environment, it is not possible to access a digital image of a painting, or a sound recording, without making several copies of it because clicking on a webpage requires a computer’s random access memory (RAM) to make a copy of it and the source code in HTML (hypertext markup language) constitutes a copy as well.<sup>193</sup> All these are covered under the limitation for temporary reproduction. This represents just one of several ways in which new technologies are challenging traditional copyright concepts.

Cultural professionals are requesting that a new specific exception be built into copyright law for purposes of preservation or restoration. Indeed, just as computers make several copies in their RAM in order that an image can be seen on a monitor screen, or a piece of music can be heard, or a video watched, so are several “incidental” copies made in the process of several administrative duties.

### ***Restoration***

Restoration can present an “originality” problem to the extent that reproducing an original work or object of related rights in carrying out one’s legitimate profession may create another protectable work. Certainly a restorer’s or media preservationist’s job requires skill, selection and creativity. The restored work that is the outcome of this labor often owes its success to a particular restorer or media preservationist. The very nature of his work, however, could be understood as copying the original work, as a new work is not being created and it usually falls short of the originality requirement for protection.<sup>194</sup> As one pair of scholars noted: “[T]o recognize inpainting or replacement of losses as original artwork in itself and thereby encourage such practices in order to satisfy the requirements of copyright law, is dangerous and contrary to the interest of the profession and art.”<sup>195</sup> While it has been suggested that the work of restorers and conservators constitutes “an original contribution by the conservator to the work itself,”<sup>196</sup> it is not something that has been tested in the courts and is not common practice.



### Preservation

Many jurisdictions tackle the issue of exceptions and limitations with regard to preservation. As the *WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives*<sup>197</sup> states, national laws differ greatly and in nearly all respects, from their scope of applicable institutions to the specific activities encompassed.

The Copyright Act of Canada, for example, permits libraries to make copies of works under various circumstances for purposes of preserving or maintaining library collections.<sup>198</sup> The United States of America Copyright Act allows archives, libraries and occasionally museums to make preservation copies, security copies, and copies for deposit in other research institutions.<sup>199</sup>

A few laws allude to moral rights. The library exception in Mexico requires that a preservation copy may not alter the original work. The preservation statute of the Netherlands explicitly assures that the author retains certain moral rights.<sup>200</sup>

The laws address the issue of digital media in several different ways, sometimes explicitly, and sometimes by implication. Many statutes do not mention the issue at all. In some countries, the statutes state clearly that digital copying is or is not permitted, and in those cases digital copying may be allowed only for some purposes, but not for others.

- Austria: Has a general provision for library copying, which explicitly allows digital copies in some cases;
- Canada: Allows copies of articles for research or private study, and the statute provides that the copy given to the user may not be in digital form;
- China: Allows some preservation copying in digital formats;
- Denmark: Has a separate statute governing the making of digital copies for library users. It permits digital copies of articles and other works, but subject to an extended collective license and the right of the owner to demand remuneration;
- United States of America: Explicitly allows digital copies for preservation and replacement, but the statute is silent on the prospect of digital copies for research or interlibrary loans.

In the TCE context, institutions sometimes complement existing law by adding additional guidelines which better serve the interests of indigenous peoples and traditional communities and suit the often sensitive nature of TCEs (examples of such guidelines are examined in Part III).

For example, the American Folklife Center (AFC) is currently working on issues of digital preservation and web access to its collections. “The growing number of digitized audio, video and image collections (photos as well as manuscripts) raises new questions about access and reproduction rights, e.g., the processing of photo and phono-duplication requests. Digital formats enhance and facilitate broad access, but may require the development of revised IP policies for use of the collections.”<sup>201</sup>

A good example of the AFC reproducing a public domain collection is when, in 1982, the AFC received permission from the Omaha Tribal Council to transfer into a modern format a traditional music collection made in the 1890s. The original recordings were in the form of wax cylinders. In 1999, the AFC collaborated with the Omaha again to produce the online collection which, in addition to the digitized recordings also features recordings from the 1980s.

The Director of the AFC said that “[t]he key to the success of these two endeavors (the album and the online presentation) was close collaboration with the owners of the cultural materials...an attitude where showing respect, carefully listening to tribal concerns, working together toward common goals, and taking the time to do things properly was fundamental.”<sup>202</sup> These achievements highlight the importance of collaboration, where indigenous and traditional thoughts, opinions and expertise are actively sought out, welcomed and incorporated into the decision-making processes. This is how new relationships are created, and how new frameworks for managing collections, their access and their reproduction can be developed.

#### KEY POINTS

- Copyright laws incorporate exceptions and limitations under which the public may use copyrighted material without the permission of the copyright owner. These exceptions and limitations are sometimes termed “fair use” or “fair dealing” in the common law tradition.
- Preserving cultural works presents some unique issues with regard to IP. Some cultural institution professionals are hoping that specific exceptions can be built into legislation insofar as they allow the making of administrative, back-up and/or archival copies of copyrighted works.
- Restoring cultural works runs into copyright’s originality requirement: it is unclear whether a restored cultural work is a new work for copyright purposes or if it is merely a form of copying from an older work – and therefore unprotectable by copyright.
- Copyright exceptions do not always suit the needs of indigenous and traditional communities and their TCEs. The sacred, secret or otherwise sensitive nature of a given TCE may render it inappropriate for certain groups of people or under certain circumstances that would normally be acceptable under exceptions or limitations.
- The management of TCEs presents complications. Some cultural organizations that work with TCEs have, in tandem with the communities whose TCEs they steward, fashioned their own guidelines for access, control and management of the collections.

## 6. Ownership, Transfers and Licensing of Copyright

Physical possession or ownership of a physical work does not necessarily imply ownership of copyright. Various national laws state this explicitly.<sup>203</sup>

### *Ownership*

The principle of copyright ownership is important for cultural institutions wishing to reproduce material from their collections or wishing to alter it once they have purchased it and taken physical possession. If a cultural institution owns a physical protected artwork, or texts or sound or video recordings, but not the copyright in them, it may not make any use it wishes of said artwork or other material. For example, it may be permissible, under an exception or limitation, to have a photograph of such material reproduced in a magazine or in promotional pamphlets. But the same use would not be allowed for postcards to be sold in the shop. Similarly, an archive that holds original field recordings of traditional musicians may not produce a commercial recording of these without the consent of the artists.

Likewise, if a traditional song from an indigenous group or traditional community is transcribed by an anthropologist, the song is still owned by the group or community, even if it is the anthropologist who fixed it. As such, the analysis might be different for certain textual works that can exist absent the initial

fixation; for instance, a prayer could be taken from an academic article and put on a condolence card without the person who fixed the prayer having any underlying rights.

### ***First Ownership, Joint Ownership***

The author is generally the first owner of the copyright. Multiple national laws have some exceptions to the general rule, for example for works made by employees or commissioned works, where the copyright initially vests in the employer or commissioner, as the case may be.

Co-authors of a work are co-owners of the copyright in it. “Co-ownership may arise not only from co-authorship but from other relationships and transactions. For example, two or more persons may become co-owners [...] if copyright is transferred to them jointly.”<sup>204</sup>

### ***Crown or Government Copyright***

Another layer of complexity to questions of ownership is the copyright claim made by the government in its works, called “Crown copyright,” in the United Kingdom<sup>205</sup> and several other Commonwealth countries such as Australia,<sup>206</sup> New Zealand<sup>207</sup> and Canada.

Conversely, other jurisdictions, including the United States of America,<sup>208</sup> the Czech Republic,<sup>209</sup> Germany<sup>210</sup> and the Netherlands<sup>211</sup> do not employ government-owned copyright mechanisms; generally, most works produced by government employees, in their capacities as such, are not protected under copyright law and are immediately available in the public domain.

Differences between governments that employ Crown copyright and those that do not could directly affect a multitude of works housed in a cultural institution. For example, if an employee of the British Government wrote an overview of an exhibition at the National Gallery in London, Crown copyright would subsist in that writing and the National Gallery would have to obtain permission to use that writing in promoting itself.

There are possible interesting implications for TCEs. In the Australian case *Yumbulul v. Reserve Bank of Australia*, Aboriginal artist Terry Yumbulul had given permission to the Aboriginal Artist Agency to license uses of his painting of his clan’s morning star pole, which has sacred meanings within the clan. Due to a misunderstanding about the intended use of the painting, the Agency granted permission to the Reserve Bank to use Mr. Yumbulul’s artwork on a commemorative banknote. Yumbulul claimed that the reproduction of his painting on the banknote constituted a copyright infringement. The case was ultimately dismissed since both the Agency and the Reserve Bank acted with proper legal authority. The banknote remains copyrighted by the Australian Reserve Bank, meaning the design is effected by Australia’s Crown and this particular iteration of the image is under the government’s copyright.<sup>212</sup>

### ***Assignment***

Economic rights are in most jurisdictions capable of transfer (assignment or cession). An assignment or transfer need not grant the whole copyright; each right may be transferred and owned separately. An assignment changes ownership in the right from assignor to assignee.

## *Licensing*

Licensing is a mechanism by which a copyright owner's rights – all or part thereof – can be transferred for a limited or unlimited time, exclusively or nonexclusively, to another party. A license is just a consent, a permission, or clearance to use a work, on the terms specified by the licensor, who remains the owner.

Depending on the jurisdiction, copyright can be passed from the rights owner to someone else through a contract or by operation of the law, such as in a will or by intestate succession.<sup>213</sup>

The non-profit organization Creative Commons<sup>214</sup> is developing standardized licenses under the copyright regime for authors who would like to make their works more accessible than the current copyright regime initially provides for. A series of Creative Commons licenses gives creators some flexibility within current copyright regimes by giving them the option to pre-license an array of uses, for example, free access and even full reproduction in certain cases. Rather than claiming “all rights reserved,” the Creative Commons licenses allow authors to reserve “some rights.”

Creative Commons licenses are being adopted in many different contexts. For cultural institutions that own copyright in their collections and whose mission is to provide increased access to and circulation of information and knowledge, such licenses may be appealing.

The extent to which Creative Commons licensing schemes offer new options for the better management of collections of TCEs deserves some attention.<sup>215</sup>

It is certainly possible that for many contemporary traditional artists and communities making new works that incorporate TCEs, these licenses could offer flexibility. They could also address indigenous and traditional needs in relation to access, circulation and reproduction.

However, the interests of all tradition-bearers are not necessarily the same as those of the general “public” that emboldens the objectives of the Creative Commons movement. In a broad sense, the openness that the Creative Commons movement argues for is opposite to the control that many TCE creators desire.

A further challenge for TCEs and Creative Commons is the question of who might be able to speak on behalf of the community. If a user sees a TCE with a Creative Commons license, the assumption is that the user can trust the license. What if a different part of the community disagrees with the limitations placed on the use of the TCE? Creative Commons might not work as well with group rights as with individual rights.

There needs to be more awareness of where traditional needs differ, and where for instance, new alternatives for indigenous peoples and traditional communities and the TCE collections can be developed. TCE collections require sensitivity because of their nature, as well as the conditions of their accumulation and acquisition.

Tradition-bearers have the right to make decisions about what is available and how they are represented. In the past, this was rarely, if ever, a consideration. In our current moment, it is vital that indigenous and traditional perspectives are not only heard but treated with respect and legitimacy. There will be times when tradition-bearers' needs run counter to liberal notions of open access and disclosure. Tradition-

bearers may ask for collections that are currently openly accessible to be restricted. It should be remembered that some indigenous peoples and traditional communities have only recently gained access to many collections that pertain to their families, clans, tribes and communities. These collections often hold sensitive and private information. Therefore tradition-bearers should be given adequate time, advice and authority to decide when and if public access should be allowed.

This will test the commitment that cultural institutions have to understanding the past and seeing how this past informs indigenous peoples' and traditional communities' current needs. Building new relationships that foster dialogue about what is at stake, and for whom, is vital for the successful management of such valuable material.

#### KEY POINTS

- First ownership vests in the author. Although the author is often an individual or a legal entity, some jurisdictions allow for joint ownership of copyright. In the context of TCEs, it means that a collectivity of community could potentially be considered an author.
- A copyright owner has the option to give, grant or assign (sell) or license (loan) some or all of his copyright rights.
- A license may be exclusive, or sole, in which case the licensee is the only one that can have a licensing agreement with the licensor. Or a license may be non-exclusive, in which case the licensor may license his right to as many licensees as he wishes.
- Crown copyright applies to some Commonwealth jurisdictions; it protects copyrightable works made by the governments of these jurisdictions. Some jurisdictions employ the opposite strategy such that anything created by an employee of the federal government is automatically considered public domain material.
- Creative Commons offers standardized licenses based on the current copyright system. Important questions need to be asked about how indigenous and traditional community interests might be facilitated through these licenses.
- In certain circumstances, the interests of tradition-bearers actually run counter to arguments for greater access. Further, unless the tradition-bearers are involved in the decisions about what of their TCEs are made available for further access, there is the danger of replicating the historical marginalization of indigenous peoples' and traditional communities' rights to have a say in how their knowledge and cultural material is accessed and by whom.
- The politics of "sharing" knowledge needs to be carefully considered. Before a TCE is made more accessible, indigenous or traditional communities should be consulted and the implications of increased access fully explained. Questions about who will have access need to be asked. These questions recognize the historical treatment of indigenous peoples and traditional communities and their collections of TCEs. They aim to remedy this.

## 7. Related Rights

In addition to copyright, there are also rights “related to,” or considered “neighboring on,” copyright. These aim to provide protection to those who assist authors in communicating and disseminating their works to the public. They are generally more limited and of shorter duration than copyright’s economic rights. The three main ones are:

- rights of phonogram (sound recording) producers;
- rights of performers; and
- rights of broadcasting organizations.

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations<sup>216</sup> (1961) is the international instrument dealing with related rights.

The 1996 WIPO Performances and Phonograms Treaty<sup>217</sup> (WPPT) complements the Rome Convention and updates the original concepts of related rights protection for new digital media.<sup>218</sup> Importantly, it provides rights in performances of expressions of folklore. Article 2, at the definition for “performers,” states that they “are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or *expressions of folklore*” (emphasis added). The WPPT grants performers both moral and economic rights, and these are set out in Articles 5 to 10 of the Convention.

Related rights, and the manner in which they are exercised, can be useful and significant for the protection of TCEs and may be able to meet the needs of indigenous peoples and traditional communities. The examples of TCEs that indigenous peoples and traditional communities wish to protect include traditional performances, such as dances and plays. For instance, in an oral culture, it is often through performances of songs, and chants or narration of stories that elements of traditional culture are passed within a community and between generations. Folk tales, poetry, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances. Performers’ rights give the traditional performers the right to determine whether their performances should be fixed (e.g. recorded on tape, digitized), and how the fixation (e.g. recording) of the performance should be further disseminated and used.

Moreover, it has been suggested that the protection of performances of expressions of folklore might, indirectly, provide adequate protection for the expressions of folklore themselves. This is probably a fair expectation, provided the performer is from the community that is the “holder” of the expression of folklore. If not, the expression may still receive indirect protection, but any benefits will not accrue to the community.

Also, for example, in the United Kingdom, an oral history recording would create not only a performance right but a literary right for anyone speaking on the recording.<sup>219</sup> Any such rights created give both economic as well as moral rights in most European Union Member States.

There are however some aspects of the protection of performers’ rights that are less advantageous from the perspective of indigenous peoples and traditional communities. Perhaps chief among them may be that the WPPT does not extend to the visual part of performances. Only the aural parts are protected, that

is, parts that may be perceived by the human ear. This would appear to seriously limit the usefulness of the WPPT in so far as TCEs are concerned. Work continues on the development of an instrument for the protection of audiovisual performances.

The relevance of related rights for museums, libraries and archives depends on their collection and specific activities.

For example, the Alutiiq Museum in Kodiak, Alaska,<sup>220</sup> has film and audio recordings of the Alutiiq language, interviews with elders, recordings of various events in the Alutiiq community, archaeological excavations, and media presentations on Alutiiq heritage projects. The Museum understands the diverse interests involved in the several stages of recording, copying and preserving these materials. In most jurisdictions, related rights will belong to the institution that produced, commissioned or funded the recording rather than in the persons who were recorded. The difference between the rights or interests of a TCE holder or his community and those of the “recorder” should be taken into account at all these various stages.

Another specific example where related rights are relevant to TCEs is in music recording and/or archiving. The Traditional Music Archive (TRAMA) is a research and documentation center in Sudan focusing on the collecting, documentation, preservation and dissemination of traditional music and folklore. TRAMA signs consent forms with tribal representatives of each group it represents before any performance is recorded. In its archive, approximately 4000 recordings are being considered for digitization for preservation and dissemination purposes. TRAMA works with tribal representatives to make and sell recordings and shares the financial benefits with them.<sup>221</sup>

#### KEY POINTS

- Related rights provide protection of phonograms (sound recordings); broadcasts; and performances.
- Related rights are also specifically applicable to performances of expressions of folklore under the WPPT; this is the only specific mention of TCEs in WIPO’s binding international treaties.

## 8. The Internet and Digitization

The Internet and the widespread use of computers have created an unprecedented platform for the dissemination and viewing of a wide range of cultural content in a very accessible, comprehensive and easy-to-use format.

Many indigenous or traditional artworks, as well as video and audio recordings of TCEs, can be digitally reproduced in a high-resolution format and disseminated via the Internet. This, essentially, albeit arguably, replicates the experience of viewing the original.

Many cultural institutions offer at least a portion of their collections online in some viewable format. This often ties directly to most institutions’ mission of public education and the promotion of their own exhibitions or collections. Making parts of collections available, when appropriate, meets both public expectations and the concerns of the community from which the collection was drawn. A recent American Study on the Internet’s Impact on Museums and Libraries<sup>222</sup> indicates that the Internet is not replacing in-person visits and, indeed, may increase onsite use.

Libraries, archives and museums are grappling with the time, effort, expense and policy considerations inherent in digitizing their collections for the Internet or for a DVD or CD-ROM.

Cultural institutions are choosing various formats for disseminating their collections digitally. Some have digitized their own collections and manage image usage themselves. The Frick Collection in New York, for example, has digitized the majority of its collection and provides a searchable visual catalog online. El Greco's *Purification of the Temple*,<sup>223</sup> for instance, is viewable as a thumbnail and as a "zoomable" image. On its *Permissions* link, it specifies:

*This Web site and its contents, including images and text are copyright © 1998-2005 The Frick Collection. This site is for personal, educational, non-commercial use only and may not be reproduced in any form without the express permission of The Frick Collection.*<sup>224</sup>

Russia's State Hermitage Museum in St. Petersburg has a similar interface for viewing its digital collection. Thumbnail and zoomable "full-size" images are available online. A different El Greco painting, *Saints Peter and Paul*,<sup>225</sup> is viewable online in much the same format as the one that is physically found in the museum. The museum's "image use policy" simply states that reproduction of the images requires written permission from the Hermitage Museum and that all the images have been watermarked for protection.<sup>226</sup>

Cultural institutions can try to limit infringements of the rights of protected works by using various forms of digital rights management (DRM), such as watermarking.<sup>227</sup> DRM is a term often used in conjunction with "technological protection measures" (TPM). Both are employed to prevent copyrighted works from being accessed or used except under conditions set by the copyright owner.

Other cultural institutions have assigned or licensed copyright in their collections' images to third party image banks, such as Corbis Corporation or Getty Images. For example, the Brooklyn Museum of Art, Russia's State Hermitage Museum, the National Gallery in London and the American Indian Nations Arts and Cultural Organization have all entered into contracts with Corbis to license images of their collections.

Some cultural institutions have large holdings of works still under copyright. One such museum is the Museu d'Art Contemporani de Barcelona in Spain, where thumbnails of a sampling of protected paintings are available online.<sup>228</sup> There is no copyright policy available on the museum's website. The Australian Museum of Contemporary Art<sup>229</sup> and the Museum of Contemporary Canadian Art<sup>230</sup> offer similar online material. New York's Museum of Modern Art (MoMA) has a slightly more accessible and complete online interface for its permanent collection. For example, high resolution images are offered and are available in a printable format.<sup>231</sup> Additionally, MoMA outsources its licensing and permissions to a third party and explains its policy on its Image Permissions webpage.<sup>232</sup>

As concerns online access to music, the Smithsonian Institution and its Global Sound Project is one example of how cultural institutions use the Internet for their musical and audiovisual collections. Another example is that of the Memorial University of Newfoundland.<sup>233</sup> After examining a large collection of recordings by a single collector of Newfoundland TCEs, the archive posted the entire collection online for free access and download with a statement that if anyone found the materials objectionable, the University could take them down. So far there have been no such requests. There was, however, considerable effort to minimize risk. The heir of the collector was consulted and approval gained; it was determined that none of the material was indigenous; it was apparently all traditional or in the public



domain; and it all seemed appropriate for public distribution (there were no personal narratives or embarrassing songs that seemed inappropriate for diffusion).

There is currently no universal Internet policy for cultural institutions' dissemination of images or other works from their collections. This means that each cultural institution makes decisions based on its unique needs. The past director of the Whitney Museum of Art in New York suggests that "the way forward will likely be with a combination of free content and licensable, high-resolution multimedia content, which will have to be updated, open to categorized protocols that encourage end users to contribute to databases, and emphasize live features."<sup>234</sup>

The balance a cultural institution must strike is between its mission to engender public curiosity and to provide educational experiences through disseminating information, and protecting the interests of artists and the integrity of their works, as well as avoid misuses, by limiting the ways in which the public could access cultural materials in their collections. Given the diversity among museums', libraries', and archives' collections and legal regimes, this balance is often achieved by considering factors specific to each institution. For example, institutions that hold collections of TCEs will need to make decisions that balance the "public interest" goals of the institution alongside those of the relevant tradition-bearer and/or custodians who hold legitimate perspectives about how the collection of cultural material that relates to their family, clan, community or collectivity is to be accessed and managed.

Cultural institutions making available online images of pieces in their collections without proper consultation with source communities run the risk of inadvertently displaying to the widest possible audience secret or sacred material that should not be publicly seen at all. This has happened on numerous occasions, and has served to further deepen the distrust many indigenous and traditional peoples have of collection-holding institutions. Source communities need to be involved in decisions to display images on the Internet.

For TCEs, digitization issues are not yet streamlined either internationally or domestically.

An example worthy of mention is the agreement between the Cline Library at Northern Arizona University<sup>235</sup> and the Hopi Tribe. In 1991, the parties agreed that sensitive ceremonial images would not be reproduced (or digitized for Internet access) without written permission from the Hopi Cultural Preservation Office. Access is still provided onsite.

Also, at the American Folklife Center, there are continuous efforts to protect original recordings and to re-record them in more contemporary formats that have a better chance of maintaining quality integrity for a longer period of time. For example, the AFC has an agreement with Flickr, an image and video hosting website and image repository. Thousands of photographic images from the Farm Security Administration/Office of War Information are available to the public.<sup>236</sup> "Each change in technology, however, has meant that the archive's reissues have become almost as inaccessible as the original field recordings from which they were taken."<sup>237</sup> This creates a range of challenges, for which there are no easy answers. As a federal institution in the United States of America and part of the Library of Congress, the AFC does not retain copyright in its website. It also transfers the burden of identifying copyright owners to the users: the AFC website emphasizes that it is the researcher's obligation to determine and satisfy the copyright and/or other restrictions that may exist with the material, and gain permissions if they want to copy them.<sup>238</sup> While this approach shifts responsibility from the institution to the user, it is not clear how effective this is in terms of preventing unauthorized use of material.

In France, government organizations, such as the Musée du Quai Branly, do not automatically relinquish copyright and, as such, the content of the website vests either in the museum or in another copyright owner.<sup>239</sup>

According to a recent study carried out by the United Kingdom Higher Education Digitization Service, no cultural institutions are fully recovering the costs of creating and managing a digital collection along with the storage and service provisions that inherently accompany them.<sup>240</sup> Cultural institutions that understand the financial potential of their digital collections, and that bear in mind their mission to make their collections accessible, should assess whether they should digitize works, and formulate a rate scale that takes into account the different types of uses for such images, be they educational or commercial, or other.<sup>241</sup>

#### KEY POINTS

- New technologies have provided exciting possibilities for cultural institutions, as they can facilitate the further dissemination of their collections.
- Providing digital access to some collections, or part thereof, may increase footfalls in cultural institutions.
- Digitization and the Internet have also presented challenges for cultural institutions in that copyright law comes into play in reproducing cultural works, and an array of issues including moral rights, licensing schemes, DRM and administrative burdens are increased.
- Digitization, the Internet and their impact on TCEs form a relatively new area of concern. While some indigenous groups and traditional communities have begun using DRM to control degrees of access to information within databases, cultural institutions need to be mindful that this is by no means the norm. These increased possibilities for disseminating and circulating information may be a direct antithesis to indigenous and traditional perspectives about how access to their collections is to be provided.

## 9. Collective Management

Collective management organizations, or collecting societies, offer an efficient mechanism through which artists and authors can collect royalties on uses of their creations without having to monitor those uses themselves. Collecting societies take on many forms; some are organized through private agreement; others are mandated by national legislation. They can apply to several creative formats or just a few; for example, some collecting societies deal solely with visual reproductions of two-dimensional art while others deal with music. A common business model for a collecting society consists of the society's right to grant non-exclusive licenses in a work, to collect royalties based on that license, and to distribute those royalties to the artists. Collecting societies also often enter into reciprocal agreements with other collecting societies and negotiate fees for blanket licenses.<sup>242</sup>

Some cultural institutions are digitizing and managing their own collections in ways that replicate the function of collecting societies.<sup>243</sup> In such cases, it is important to have mechanisms in place for the administration of materials and collections. Other institutions outsource this management duty to organizations whose expertise is licensing images and music for commercial use.<sup>244</sup>

The International Federation of Reproduction Rights Organizations (IFRRO) works to internationally increase the lawful use of text and image-based copyright works and to eliminate unauthorized copying

by promoting efficient collective management of rights to complement creators' and publishers' own activities. In 2008 it issued a statement on TK and TCEs, stressing its commitment to "assisting communities in developing frameworks furthering cultural and academic progress and stimulating incentives for investing in cultural and creative industries and practical implementation *inter alia* through RROs." <sup>245</sup>

Sámikopiija, the Sámi Reproduction Rights Organization, is a reproduction rights organization that represents Sámi rights owners in Norway, Sweden, Finland and the Russian Federation. According to its website, Sámikopiija has started working with the issue of indigenous peoples' TK related to copyright, and made this an independent project in its activities.<sup>246</sup> There is also a proposal to the Nordic Sámi Convention where the protection of TK and TCEs is included.

In Australia, there are calls for greater infrastructure to support and defend indigenous cultural and IP rights based on a collective management model. One idea is the establishment of a National Indigenous Cultural Authority to facilitate consent and payment of royalties, to develop standards of appropriate use to guard cultural integrity, and to enforce rights, including moral rights. "While it is important to have rights, it is also important to establish mechanisms by which to assert them. To administer rights and protect them, it is necessary to set up indigenous cultural infrastructure – administrative processes and persons in authority who can act, negotiate and hold collectively rights to culture. [...] A National Indigenous Cultural Authority can provide leadership and administer rights either directly or by establishing a rights clearance framework for indigenous cultural and IP rights. [...] It [also] has a role to assist users make contact and identify relevant indigenous owners." <sup>247</sup>

#### KEY POINTS

- Collective management streamlines royalty collection for copyright owners. Depending on the copyrighted media and the jurisdiction, collecting societies have reciprocal relationships with each other and direct their payments to foreign societies and to their own domestic shareholders according to these contracts.
- Collective management could offer an interesting opportunity for TCEs. Norway's reprographic rights organization, for example, includes its indigenous communities both in the management and monetary proceeds of royalty collection.

## TRADEMARKS, GEOGRAPHICAL INDICATIONS AND DOMAIN NAMES

### 1. Trademarks

As opposed to copyright, trademark protection functions mainly in the context of business transactions. Where concerns arise about protection against commercial misuse of TCEs, unfair competition law may also provide a practical response to the needs and expectations of traditional communities. While it certainly benefits trademark owners who trade on the goodwill they have established in their mark, it also benefits consumers and aims at protecting them from purchasing goods or services that do not meet the expectations they associate with a given mark.

Museums, libraries and archives are well-positioned to use trademark law in an effort to attract potential exhibition viewers and potential gift shop buyers to their premises. Branding is often a viable and potentially lucrative option. A cultural institution logo or name has the ability to communicate quality, exclusivity and a range of other thoughts the public associates with brand names.

The list of items that could be protected by trademark law includes the cultural institution's name, any associated names, such as the affiliated café or a weekly publication. Some examples include the *Grand Louvre au Japon*, an independent organization in Japan created to strengthen links between the French museum Le Louvre and the Japanese public, *SAFE: Design Takes on Risk*, the name of a blockbuster exhibition at the Museum of Modern Art in New York in 2005,<sup>248</sup> and SFMOMA, the acronym for the San Francisco Museum of Modern Art.<sup>249</sup>

Also, the New York Public Library publishes its own range of products.<sup>250</sup> Its logo on the cover or spine of the book associates the library with certain artists or authors and the quality of the book becomes a reflection of the institution.

Another example of cultural institutions using trademarks is at social events.<sup>251</sup> Aside from the actual invitations themselves, the ensuing photographs, social diary write-ups and other residual word-of-mouth links a cultural institution with a variety of things: from celebrity patronage to "party favors" from renowned designers.<sup>252</sup>

Cultural institutions owning artwork or selling posters, ceramics or other derivative works based on artwork should be aware of the basic tenets of trademark law.

Trademarks around specific names have been developed. For example, the Picasso Estate administers the rights on the trademark "Picasso" and other IP rights such as the Picasso signature. The Estate has been involved in an array of lawsuits. Wisely, it has put together an informative website regarding how various entities should request and obtain permission for use of the Picasso name or signature.<sup>253</sup> Recent case law involving the Picasso name includes a case brought by the Estate against DaimlerChrysler in a failed attempt to stop them from using the trademark "Picaro" on a car.<sup>254</sup> Moreover, in 2002, the Estate successfully brought suit against the registrant of three domain names: [www.fundacionpicass.com](http://www.fundacionpicass.com), [www.museopicassomalag.com](http://www.museopicassomalag.com), and [www.museopicassodemalaga.com](http://www.museopicassodemalaga.com).

TCEs have faced their share of challenges in the trademark area.

Trademarks may be used defensively (stopping the use of TCEs in unrelated commerce) and positively (promoting authentic works, goods and services).

The Zia sun symbol of the Zia Pueblo tribe in New Mexico is, to the tribe, its most sacred sign. “That’s what we pray through, the sun. Anything to do with religion...that’s what we use.”<sup>255</sup> The symbol itself has been used as a logo or trademark “on everything from dishes and linens to motorcycles and portable toilets.”<sup>256</sup> This situation was eventually addressed by the United States Patent and Trademark Office (USPTO) through a series of public hearings but no Federal law was put in place and no compensation scheme was set up in response to the call of the Zia Pueblo tribe.<sup>257</sup> In a statement made at the hearing, Governor of Zia Pueblo, Amadeo Shiye explains:

*...the injury that my people have suffered from the disrespectful use of the Zia sun symbol has been very, very deep. The history of the European in this continent has been a long history of unauthorized taking. We are in the beginning of, I hope, a different frame mind. I do not see how the trademark office in good conscience can give a person, foreign to our nation, the right to use our symbol on a chemical fertilizer or a porta-pottie...Under the existing law, other governments in this country are protected from such an affront.*<sup>258</sup>

As John T. Solbakk of Sámikopijja puts it, today, many companies outside of Sápmi (Sámi land) mass produce *duodji* (handicrafts) or other culture-based products and market them as original Sámi, usually using a deceiving “indigenous peoples’ stamp” to promote them. In other words, anyone can commercially produce Sámi without asking the Sámis or Sámi organizations or institutions for permission. Sámi organizations have attempted to label approved Sámi handicraft products with a special trademark so that the consumer can differentiate these from imitations, but even this original Sámi trademark has been imitated.<sup>259</sup>

To the extent that an eventual definition of TCEs would include words, signs, names and/or symbols, trademark owners have expressed concern that a *sui generis* law protecting TCEs would run into and possibly contradict trademark law as it exists. “Most countries’ trademark systems include a mechanism for managing conflicts between trademarks with a level of international uniformity.”<sup>260</sup> Trademark laws remain national in nature although an international system does address the central management of trademark applications and registrations on an international scale for the parties to that system.<sup>261</sup>

There are examples showing how the legal system as it currently stands, might not work to adequately protect indigenous and traditional interests. However, there are also examples that show how public scrutiny, which can engender bad publicity for the third party involved, can prompt the latter to alter its use of the trademark.

One such example is an attempt by a British company to register the word “Kikoi,” which is a Kiswahili word for a colorful wrap skirt worn by men and women living on the East coast of Africa. The Kenya Intellectual Property Institute, with the help of development charity Traidcraft Exchange and law firm Watson Burton, wrote a letter of complaint to Kikoy Company UK Limited, the company that had applied for the trademark. The company subsequently dropped the trademark application.

Another example involves the American cosmetics and beauty company Aveda Corporation. In 2002, Aveda released a range of skin care products under the name “Indigenous.” As part of the process of marketing the “Indigenous” line of products, Aveda also registered “Indigenous” as a trademark in a

number of jurisdictions including the United States of America, Canada and Australia. This provoked negative reactions from several indigenous groups. Following a range of lobbying and discussions, Aveda decided to drop the Indigenous product line and to discontinue using the trademark and the product line. As Aveda explained in a press release, “we are discontinuing the Indigenous product line to demonstrate our ongoing support and respect for indigenous peoples in their efforts to protect their traditional knowledge and resources.”<sup>262</sup>

Aveda has subsequently established some partnerships with indigenous groups in Australia and the Americas. For instance, it has formulated a specific benefit-sharing agreement between the Kutkabubba Aboriginal community in Australia and the exporter of a specific kind of sandalwood oil. The agreement that operates under an accreditation protocol pays the indigenous community for using their land and knowledge to source the sandalwood for Aveda’s products. In taking this course of action, Aveda was able to ameliorate a potentially damaging corporate image.<sup>263</sup>

## 2. Geographical indications

The term “geographical indication”<sup>264</sup> is defined in Article 22.1 of the TRIPS Agreement as an indication which identifies a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.<sup>265</sup>

Some TCEs, such as handicrafts made using natural resources, may qualify as “goods” which could be protected by geographical indications. In addition, some TCEs may themselves be geographical indications, such as indigenous and traditional names, signs and other indications.

For example, in Portugal, Madeira embroidery is protected as a geographical indication. In Mexico, the appellation of origin OLINALÁ is applied to lacquered wooden articles, such as chests and crates, made in the city of Olinalá, state of Guerrero. The artisans use wood from the endemic Aloe tree (*Bursera aeloxylon*) and natural raw materials such as insect fat and mineral powders. The appellation of origin, considered an element of the national heritage, belongs to the State. In the Russian Federation, a number of ancient products are protected with appellations of origin: Velikiy-Ustyug niello,<sup>266</sup> Gorodets painting, Rostov enamel, Kargopol clay toys, and a Filimonov toy.<sup>267</sup>

Just like trademarks, the protection of geographical indications is aimed at the protection of the goodwill and reputation of indigenous and traditional communities acting as tradespersons and their products and to prevent the unauthorized use of such signs which is likely to mislead consumers. Geographical protection can continue indefinitely (subject to certain conditions).

## 3. Domain Names

Domain names raise new IP considerations which also affect all cultural institutions as well as indigenous and traditional communities. Having an Internet presence is often essential for cultural institutions for a variety of reasons, not the least of which includes mission statements with outreach or education goals. Indeed, museums, libraries and archives – with their wealth of diverse collections – make some of the world’s most educational and beautiful websites.

While an in-depth analysis of the Internet's domain name system and history falls outside the scope of this publication, a few key concepts of domain name management are important for cultural institutions to note.

Cultural institutions have the option to register their domain names with top-level domains (TLDs), for example with ".com" or ".org."<sup>268</sup> They may also register their domain names with regional operators, the so-called "country code top level domains" (ccTLDs), such as ".ch" for Switzerland or ".fj" for Fiji and ".mx" for Mexico.<sup>269</sup>

One example is *www.tikanga.com*, the website of an organization that acts as "a bridge between Maori artists, designers and performers and media organizations, advertising agencies, production companies and government organizations."<sup>270</sup> The word "tikanga" is Maori and means, generally, customs and traditions that have been handed down through the passage of time. The owners of *www.tikanga.com* engage in services that Maori people may find useful and in harmony with preserving cultural strength and identity.

Of particular interest to museums, since 2001, the TLD ".museum" may be used by museums, museums associations and museum professionals to register .museum Web sites and e-mail addresses.<sup>271</sup> This makes it easy for users to recognize genuine museum activity on the Internet.<sup>272</sup>

While the relevance of having a TLD dedicated to museums may have been criticized,<sup>273</sup> and while the financial viability of the ".museum" namespace may not have reached expected self-sufficiency,<sup>274</sup> the hope is that professional museum associations will provide ".museum" domain names directly to their members. It has been suggested that ICOM extend its services to play a more active role in the ".museum" domain space.<sup>275</sup>

TCEs and related words and terms have at times been inappropriately used as domain names. For instance, indigenous community names have come up as domain names for dating services and even adult entertainment sites.

Different mechanisms provide efficient tools for indigenous and traditional communities that have rights in a trademark, to protect themselves against the use of their domain names in abuse of such rights.

A cost and time efficient contract-based dispute resolution system is available for parties involved in domain name disputes involving abusive registrations of domain names made in bad faith and which violate trademark rights. The WIPO-initiated Uniform Domain Name Dispute Resolution Policy (UDRP), adopted in 1999, provides an efficient administrative procedure for the resolution of such disputes while preserving court options. The UDRP applies to gTLDs such as ".com," ".net," ".org" and ".museum." Many ccTLD operators also use the UDRP, or a close variation thereof. Of the four institutions providing UDRP dispute resolution services, a majority of domain name cases have been administered by the WIPO Arbitration and Mediation Center.<sup>276</sup>

The UDRP system has been used by cultural institutions and by indigenous and traditional communities in numerous cases.<sup>277</sup> For example, in *Maori Television Service v. Damien Sampat*,<sup>278</sup> the Maori Television Service, which operates the Maori Television to revitalize Maori language and culture, obtained the transfer of the domain name <maoritv.com> which had been used by a third party in bad faith and without rights or legitimate interests.

Another area of development is the introduction of internationalized (non-Latin script) domain names (IDNs),<sup>279</sup> aimed at expanding the number of existing TLDs.<sup>280</sup> Such DNS expansions represent opportunities for language and script possibilities, and reflect the diversity of languages, scripts, and cultural expressions inherent in a discussion of online cultural identity.<sup>281</sup> They may provide new opportunities for museums, libraries and archives to further develop an active Internet presence. For example, the Musée du Louvre could apply for the TLD “.louvre.” But it may also present greater challenges in enforcing its IP rights thereon.

As more cultural institutions build unique online presences and as more information and imagery about culture becomes easily available, IP law will increasingly be engaged.

**KEY POINTS**

- Trademarks may be relevant to the management of TCEs for cultural institutions. Trademarks are distinctive signs used to identify the source of origin of goods and/or services in the marketplace and to distinguish such goods and services from those of competitors.
- Trademarks may also serve as labels of authenticity, or certification and ensure the origin and genuineness of TCEs.
- Cultural institutions should fully understand the ramifications of using TCEs as logos or product identifiers.
- Geographical indications may be useful to protect TCEs that are specific to a particular region.
- Cultural institutions need to be sensitive to misusing culturally significant words as titles or domain names.



## RISK MANAGEMENT STRATEGIES AND DISPUTE RESOLUTION

There is a range of strategies being developed to help build better relationships between cultural institutions, researchers and indigenous peoples and traditional communities. These strategies can all be understood as efforts to change objectionable attitudes and behaviors in the documentation of TCEs and it is hoped that they will lead to productive and valuable dialogue.

### 1. Risk Management Strategies

For cultural institutions, there is much to be gained from the development of risk management strategies regarding TCE collections. In this sense, a risk management strategy works to identify potential areas of conflict or concern, and in doing so, exposes issues that should be addressed at the outset (for example, prior to the creation of a new exhibition or to the digitization of a collection of TCEs).

Risk management strategies create awareness within a cultural institution: if and when a problem arises, solutions may quickly and effectively be implemented. These strategies seek to set out and balance the risks against the advantages of utilizing TCEs and create protocols to manage complaints if they arise. Risk management is a pro-active process that confronts the difficulties that such collections may potentially produce.

Risk-management strategies are especially useful in cases where owners or source communities for TCEs are unable to be identified and located. Experience shows that once a previously unknown work enters into different forms of circulation (for example on the Internet), previously un-contactable or unknown owners can emerge with a claim to the material. Under such circumstances, risk-management strategies can provide guidance to the cultural institution for an ethical and legal response. The development of such strategies also helps in identifying which material within the institution might constitute a high risk, and which material might present a much lower risk.

### 2. Dispute Resolution

As this publication has highlighted, accessing, controlling and protecting TCEs can be sensitive. This often affects relationships between indigenous peoples and traditional communities, on the one hand, and holders and users of TCEs, such as museums, archives and libraries, universities, industry, individuals and nation states, on the other hand.

Disputes between tradition-bearers and third party users of TCEs over ownership and control, access and benefit-sharing in TCEs have steadily increased in the last five years. These disputes are often complex, multi-dimensional and involve legal and non-legal components. Importantly they are not always commercial in nature, and can involve ethical, cultural, religious/spiritual and moral dimensions. For example, inappropriate use of a secret or sacred cultural artifact, symbol or design may not cause financial loss but can cause considerable spiritual offence.

Deciding how to resolve these disputes is often just as difficult as the dispute itself. Should parties go to court, attempt amicable resolution, try to reach a settlement through mediation or a final decision through arbitration? The following paragraphs lay out the various options available and present their characteristics.

### *Litigation*

The history of collections of TCEs sometimes exerts pressure and produces conflict. In such circumstances, litigation is seldom an appropriate option, due to the limited legal rights that indigenous peoples and traditional communities actually have, and also because conflicts over TCEs often contain complex legal and non-legal dimensions.

Owing to the combination of elements that often constitute disputes over TCEs, remedy through litigation or court-based processes is not always possible or desirable. Such processes have the disadvantage of potentially further disenfranchising and alienating indigenous peoples and traditional communities as well as limiting the chance for productive resolution of the issues facing the parties.

### *Alternative Dispute Resolution (ADR)*

Alternative Dispute Resolution (ADR) refers to neutral out-of-court dispute resolution mechanisms that allow parties to resolve their differences in a time and cost-efficient manner with the assistance of one or more qualified and independent mediators, arbitrators or experts. ADR is normally consensual and can only be used if all parties agree to submit their dispute(s) to ADR.

ADR, such as mediation, arbitration and expert determination, offers a framework to address complex disputes concerning TCEs. This is already in practice in many collaborative relationships involving cultural institutions and indigenous peoples and traditional communities. For example, in Fiji a Native Lands and Title Tribunal adjudicates disputes arising from traditional land claims and title holders out-of-court in the traditional manner. The tribunal is made of independent indigenous Fijian customary experts who mostly are chiefs and other community members. The appointment of the secretariat however, is the responsibility of the Ministry of Indigenous Affairs.

With ADR, the parties themselves become responsible for whether and how the conflict is resolved. Also, legal norms are not necessarily the exclusive basis for decision-making. This is particularly important given the combination of legal and non-legal dimensions that characterize disputes over TCEs.

### *Types of ADR*

- **Mediation.** Through this informal procedure, one or more mediators assist the parties in settling their disputes. The mediator cannot render a decision, but rather facilitates settlement between the parties by helping in identifying the parties' interests in order to allow them to find a mutually acceptable solution. Mediation may be particularly appropriate in sensitive cases where no legal claim exists. Moral, ethical, historical and cultural elements can be considered in mediation and provide a basis for settlement.
- **Arbitration.** In arbitration, the parties submit their dispute to one or more arbitrators who issue a binding and final decision that is internationally enforceable.<sup>282</sup> Of particular interest for disputes involving TCEs, the parties can ask the arbitrator to decide *ex aequo et bono*, i.e., on the basis of principles of fairness. In certain instances they can also agree on the application of customary law.
- **Expert Determination.** Through this procedure, one or more experts make a determination on a specific issue referred by the parties. For example, an expert could determine the authenticity of an indigenous or traditional song, or identify the origin of an indigenous or traditional design.

These procedures may also be combined with one another. For instance, the parties may first attempt to solve their difference through mediation and, where the dispute is not settled within a set time frame, it may then be followed by arbitration or expert determination.

### *Advantages of ADR*

ADR processes hold many advantages,<sup>283</sup> such as:

- **Consideration of parties' interests and preservation of relationships.** ADR, in particular mediation, is less confrontational and can help parties preserve their long-term relationships and foster new relationships, by finding mutually agreeable solutions. It also helps to address the underlying interests of the parties, as well as their practical needs.
- **Recognition of different cultural backgrounds.** ADR processes have the capacity to fully explore grievances in ways that recognize different cultural value systems. Parties have the possibility to choose a qualified mediator, arbitrator or expert with particular knowledge of the different cultural backgrounds of the parties. Parties can even choose several intermediaries in one ADR process, each of which would be familiar with one of the parties' cultural backgrounds.
- **Solutions beyond what court-based processes may allow.** ADR, in particular mediation, enables parties to adopt creative and mutually acceptable solutions that are not necessarily dictated by a specific law. Formal recognition of custodianship and long-term loans are examples of such possible solutions.
- **Party autonomy and flexibility.** ADR allows all parties, including those who have historically been alienated from formal legal frameworks, to control the process in a flexible, time and cost-efficient way. Parties can select the intermediary; they can also tailor the process to fit their dispute, as well as agree on the applicable law, language and place of the proceedings.
- **Expertise.** ADR enables parties to choose mediators, arbitrators and experts that have direct experience and/or substantive expertise in relation to the issues at stake, in addition to dispute resolution experience.
- **Neutrality.** ADR is an international and neutral process where parties can choose a neutral intermediary, applicable law, language and place of proceedings. Hence ADR does not suffer from the possible national bias that may occur in litigation in national court.
- **Integration of customary law and practices.** ADR can be a forum in which customary laws, protocols, codes and ethos may be considered and applied, if the parties agree so, which may be interesting in certain cultural heritage disputes involving indigenous and traditional communities. Customary law could be considered in ADR proceedings at different levels, including on substance, procedure and remedies. Moreover, ADR provides a context where an indigenous or traditional community can be a party, it also permits the recognition of relationships of individuals *vis-à-vis* their indigenous or traditional community's interests and promotes informed decisions about the level of formality within the proceedings.
- **Possible confidentiality.** Lastly, in ADR, parties have the possibility to keep the proceedings and the result confidential, unless otherwise required by law. Parties can also agree to balance confidentiality with public interest requirements.

### *How to Use ADR in Practice?*

ADR can be used if the parties agree to submit their dispute to ADR or if it is mandated by a competent court, established by law or treaty.

Consent to ADR may be obtained in a number of ways. For future disputes, parties may include ADR clauses in their contracts, such as in agreements on copyright assignment or license, loan, donation,

access and benefit sharing, or other type of agreement concerning the use of TCEs. For an existing dispute, parties may conclude an ADR submission agreement, providing that the particular dispute be submitted to a certain ADR procedure.

Typically, ADR providers, such as the WIPO Arbitration and Mediation Center, provide model ADR clauses and submission agreements that can be used by parties, with possible adaptations to fit each particular case.<sup>284</sup>

Further, ADR pledges and policy statements by cultural institutions, libraries, archives and museums, or organization representing the interests of indigenous and traditional communities could enhance the consideration of ADR.

The following are an example of an adapted submission agreement and of a pledge for mediation in the cultural heritage sector:

**Mediation Submission Agreement for Cultural Heritage Disputes:**

*We, the undersigned parties, are facing a difference over cultural heritage which may raise highly complex, legal and non-legal, commercial and non-commercial, as well as ethical and moral issues. We consider that mediation may be an appropriate and effective means of resolving our difference. In particular, we believe that mediation will allow us to identify converging interests and enable us to amicably settle our difference in a responsible and sustainable manner.*

*We, the undersigned parties, therefore hereby agree to submit to mediation in accordance with the WIPO Mediation Rules the following difference/controversy/dispute:*

[brief description of the difference/controversy/dispute]

The place of mediation shall be [specify place]. The language to be used in the mediation shall be [specify language].

**Model Pledge / Dispute Resolution Position Statement:**

*We consider that differences and disputes with indigenous communities and their members in relation to cultural heritage and/or traditional knowledge can be highly complex and involve legal and non-legal, commercial and non-commercial, as well as ethical and moral components. We recognize that for such instances, there may be alternative methods of resolution that can be more appropriate and more effective than litigation. In particular, mediation procedures offer collaborative means to take account of the parties' interests and enable them to amicably settle their case in a responsible and sustainable manner.*

*We therefore subscribe to the following statements of principle on behalf of our institution:*

*When a difference or dispute arises between our institution and an indigenous community or indigenous individual, we are prepared to propose resolution of the issue through alternative dispute resolution (ADR) methods and in particular mediation.*

Such a pledge or position statement may be adapted and inserted for example as part of codes of ethics for cultural institutions and/or as a condition for membership to a cultural institution.

It may be advantageous for libraries, archives and museums to establish dispute resolution clauses within agreements, and as standard policy across the sector. Currently, ADR offers possibilities for resolving disputes in complex cultural areas, where not all of the problems have a clear legal definition. ADR provides a framework where parties can explain what is at stake and why this matters culturally. It allows space for the expression of different interpretations of access and control, and significantly, it does not further disenfranchise indigenous peoples and traditional communities from projects of reconciliation and cultural recognition.

#### *WIPO Arbitration and Mediation Center*

A number of public and private institutions provide different kinds of ADR services. One such institution is the WIPO Arbitration and Mediation Center (WIPO Center)<sup>285</sup> which was created in 1994 as part of WIPO. This international dispute resolution provider is recognized as a neutral international forum that is especially appropriate for cross-border and cross-cultural disputes.

The WIPO Center provides WIPO mediation, (expedited) arbitration and expert determination rules, as well as model ADR clauses and submission agreements, which may be particularly appropriate in disputes involving TCEs. The WIPO Center also has a special list of mediators, arbitrators and experts with expertise in cultural heritage law and ADR experience.

In addition to the standard WIPO ADR procedures, WIPO also develops tailored ADR services, for example for the cultural heritage sector, including issues regarding indigenous peoples and traditional communities.



## PART III. CONCLUSIONS: GOOD PRACTICES

IP law itself offers a few options for the needs of tradition-bearers. While certainly there are a range of possibilities that can be strategically developed, generally speaking, for now, tradition-bearers have limited recognized and enforceable rights in relation to their cultural heritage material, and this affects the conditions for future access, control and ownership that can be negotiated.

Yet indigenous peoples and traditional communities do have legitimate interests in being part of decision-making processes around collections of TCEs. Although historically this was often not the case, current practices and responsibilities to maintain foundational principles of equality, freedom and justice requires that tradition-bearers and their opinions be heard and taken into account. Certainly the recent United Nations Declaration on the Rights of Indigenous Peoples reflects support for this position.

Much depends on the strengthening of communication and building of new relationships between practitioners within cultural institutions and indigenous peoples and traditional communities. Many solutions may reside in the development of mutually satisfying pathways for the future management of such incredibly important and valuable cultural material.

To begin the process of recognizing and respecting the rights and interests of indigenous peoples and traditional communities, it is important to develop meaningful and significant dialogue among all parties that are invested in maintaining, preserving and providing access to collections of TCEs. This means, where possible, that cultural institutions with collections of TCEs work directly with tradition-bearers, to collaboratively establish appropriate policy options for safeguarding, protecting and promoting TCEs.

Many museums, libraries, archives, and other institutions, as well as many indigenous and traditional communities, are actively developing, managing and maintaining multiple strategies concerning the safeguarding of, access to, and control over cultural heritage and TCEs, including valuable IP-related protocols, policies and practices. It is in all parties' interest to create clarity around the use of TCEs. This gets to the heart of active collection management and facilitating easier onward use of the collections - the very *raison d'être* for the existence of cultural institutions.

This publication, therefore, includes a selection of examples of current and developing practices within cultural institutions, independent archives (particularly digital archives), indigenous and traditional communities and larger research bodies. There are of course many good ones which are not included due to the sheer volume this would take.

Most examples are drawn from empirical research conducted over the last few years by an international team of consultants employed by WIPO. They are derived from existing experiences, good practices, protocols and guidelines and therefore highlight some of the work being done around the world.

Currently, the resources that have been gathered and that complement this publication include:

- **surveys** of existing resources and practices. The surveys, each focusing on a specific geographic region, are the primary basis for this publication. The surveys provide a wealth of information that comprises institutional policies, personal perspectives from veteran professionals and the opinions and experiences of the indigenous peoples and traditional communities whose TCEs are the object of these findings;<sup>286</sup>
- a selection of short **case studies** drawn from the surveys. These case studies cover a broad range of illustrative examples.<sup>287</sup>
- a searchable **database** of existing IP-related protocols, policies and practices. This database responds to a widely-felt need for more empirical information on current experiences and practices concerning these issues.<sup>288</sup>

Some of these policies and practices are being developed to directly address the management of extant collections, while others are seeking to establish appropriate frameworks for the future management of in-coming collections. Indeed research with indigenous peoples and traditional communities is still actively occurring, and thus collections of traditional cultural material continue to accumulate. These 21<sup>st</sup> century collections are born digital (most often) and are collected at times by indigenous and traditional communities themselves. The most efficient and easiest time to create usage clarity around collections is at the point that they are created; obtaining permissions retrospectively is very time consuming, labor intensive and costly, not to mention ethically inappropriate..

The direct targets of the policies, protocols and practices vary, yet they all engage specific issues that arise in the development, production and circulation of TCEs. For instance, following the lead of ICOM, many museums have developed ethical guidelines that set minimum standards of professional practice within the institutions.<sup>289</sup> Other ethnographic cultural institutions have developed specific ethical codes of conduct for researchers when working with indigenous peoples and traditional communities. Directly targeting researchers is important because they are generally the documentarians of the ethnographic materials that eventually libraries, museums and archives will manage and maintain custody over.

What is evident in these emergent practices and policies is the intention to create new and better ways of responding to the needs of tradition-bearers. Certainly there is no “one-size-fits-all” approach; there is a range of processes which are particular to each circumstance. For example, the assignment of rights created by the museum, library or archive to the community would potentially engender positive relationships and in return clear usage rights around the material would be the *quid pro quo*. In sharing information about these, it is hoped that they will provide a resource for developing new ideas and new possibilities and they may serve as a basis for further identifying IP-related “good practices” and guidelines.

The purpose of including them is to profile innovative initiatives underway and to suggest areas for further complementary work. While WIPO and its Member States do not necessarily endorse these protocols and guidelines, at this stage there is great interest in ascertaining their effectiveness and entering into productive conversations about what works, what does not, and why.



## 1. Good practices from Cultural Institutions – Research Ethics and Collection Policy

Cultural institutions face a range of issues in relation to the appropriate frameworks for managing TCEs. The IP dimension, which has been the focus here, is only one of several inter-related problems. How collections of TCEs are made, and by whom, as well as where they originate, affect how they are managed now and into the future, and with what IP implications. The answers to these questions help determine who legally “owns” the copyright, and what kind of uses of the material is possible and permissible.

### *The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)*

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is the world’s premier institution for information and research about the cultures and lifestyles of Aboriginal and Torres Strait Islander peoples and is governed by an Indigenous Council.<sup>290</sup> The Institute holds a priceless collection of films, photographs, video and audio recordings and the world’s largest collections of printed and other resource materials for Australian indigenous studies.

This Institute has pioneered unique policies for access and management of their Australian indigenous collections. These range from “Guidelines for Ethical Research in Indigenous Studies”<sup>291</sup> to policies directed at specific types of collections, for instance audiovisual archives.

The Guidelines are used nationally and set the benchmark for all research that involves Aboriginal and Torres Strait Islander people in any discipline and increasingly within industry as well. Importantly, the Guidelines introduce national and international researchers to the unique needs and expectations that indigenous peoples may have in relation to research. It is significant that indigenous peoples have the right to be engaged as equal parties, with a say in the focus and direction of any research that involves them. The Guidelines encourage practices of prior informed consent and the negotiation of any IP rights prior to the commencement of research. This matters precisely because it sets the conditions for the future management of any material produced in the course of the research.

Many of the problems facing cultural institutions arise because past standards for ethnography did not treat indigenous peoples as legitimate and equal parties. These Guidelines seek to counter this historical practice by directly addressing researchers’ responsibilities *prior to* the commencement of any research involving and engaging with indigenous peoples.

Owing to its unique circumstances, the Institute recognizes that its holdings almost always contain complex IP dimensions. For example, indigenous claims to ownership to material (such as recordings and photographs that contain ceremonies, songs, stories or images of relatives) are seldom legally recognizable. Often decisions about reproduction and/or digitization need to be made on a case-by-case basis. While this can be time-consuming, it does mean that decisions often involve discussion and engagement with indigenous peoples and a thorough consideration of the information leading to the existence of the collection, the types of claims being made, and what the decisions will mean for the future management of the collection.

These negotiations really add value to the collection – with more knowledge about how to manage and make their collection accessible, the practitioners are in a much better position to respond to the needs of



all potential users of the collection. Some collections have special conditions associated with them, for instance some material is of a secret nature, and can only be viewed by authorized individuals or family groups, or other defined persons.

The Institute privileges indigenous perspectives about knowledge control, and wherever possible, it incorporates these into its management policies. In doing so, the Institute recognizes that there are cultural conflicts inherent within the collecting, archiving and preservation process and that there are times when the goal of public access conflicts with community and TK management strategies. In such circumstances, AIATSIS endeavors to accommodate indigenous perceptions and rationalities of control and access.

#### ***Agence de Développement de la Culture Kanak - Centre Culturel Tjibaou***

The AIATSIS framework is akin to the one used at the *Agence de Développement de la Culture Kanak - Centre Culturel Tjibaou*<sup>292</sup> in New Caledonia, where researchers enter into a trust agreement with the tradition-bearers; the parties determine a degree of access, from 0 to 5. At the 0 scale, the document may only be consulted by the person interviewed or his heirs.

#### ***PIMA Code of Ethics for Pacific Museums and Cultural Centers***

The Pacific Islands Museums Association (PIMA) is a regional not-for-profit heritage organization whose aim is to safeguard, preserve and promote the heritage of the peoples of the Pacific Islands. PIMA's mission is to: support Pacific museums and cultural centers to preserve the heritage of the Pacific Islands; involve local communities in heritage management; and develop regional cultural resource management policies and practices.

PIMA has developed a region-specific Code of Ethics to be used by museums and cultural centers in Pacific Member States. It includes, among other things, guiding principles which outline the underlying reputation and responsibilities of Pacific museums and cultural centers. For instance, it states that Pacific museums and cultural centers are "custodians of cultural resources held in trust for the original creators and for the benefit of the peoples and communities elsewhere" and they have the responsibility to "build and maintain relations with local communities and assist them to maintain and safeguard their intangible and tangible cultural heritage." The aim of these guiding principles is to provide a framework for Pacific museums and cultural centers to work with communities in terms of providing access, monitoring research and assessing the significance of materials in relation to process, creators/owners and monetary value. The Code of Ethics seeks to guide Pacific museums and cultural centers towards good practices.

#### ***ATSILIRN Protocols***

The Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN) is a professional support network that functions to "support Aboriginal and Torres Strait Islander peoples working in libraries and for those people servicing the information needs of those peoples."

Since 1995, the ATSILIRN protocols<sup>293</sup> have guided practice in the Australian library, archive and information sector in relation to the treatment, access and use of indigenous materials in collections, as well as the provision of services to indigenous Australians and their communities. The protocols were developed by professionals in the sector in close collaboration with indigenous Australians, and were endorsed and published by the Australian Library and Information Association (ALIA). IP issues were

addressed as one of eleven identified principles for practice. In 2004, the protocols were reviewed for currency and effectiveness and a number of issues identified as areas for further work. The need for additional digitization protocols also was identified by professionals. Furthermore, the need to instate indigenous issues at the national policy level to encourage nationally consistent and coordinated implementation of the principles of the ATSILIRN protocols was recommended in response to a decade of patchy implementation across the sector.

In 2007, National and State Libraries Australia (NSLA) published the National Policy Framework for Aboriginal and Torres Strait Islander Library Services and Collections.<sup>294</sup> Principle 6 of this document addresses indigenous knowledge and cultural and IP rights.<sup>295</sup> Further research was conducted in 2007 in three State libraries to investigate the challenges emerging in the digitization of Australian indigenous materials.<sup>296</sup>

Uncertainty about how to deal with complicated IP issues emerge as a major challenge for the digitization of indigenous materials. Complex IP issues also emerge in indigenous communities that store digital copies of repatriated materials in their community databases. These databases increasingly form a central part of innovative remote indigenous library services. Some research on these issues has been done<sup>297</sup> but further research for the development of practical guidelines in this area is also ongoing.

These responses from the Australian library and archives sector acknowledge indigenous Australian contest of control, access and use of indigenous cultural materials held in collecting institutions, where “the primary rights of the owners of a culture” are in contrast to “the interests of the authors and publishers of records, books and other documentary material that are protected by copyright law.” Research and experience in the Australian library sector highlights that establishing ways to accommodate Aboriginal and Torres Strait interests and rights in owning and controlling historical and contemporarily developed cultural information requires efforts at national policy and institutional practice levels and at the indigenous community level.

At the level of practice, negotiating these different interests requires more than simple interpretation or application of customary versus copyright law in relation to materials and collections. It requires workable processes that enable both professionals and indigenous peoples to accommodate each other’s interests with some certainty that transparent standards of best practice are being developed. The shared space is always likely to involve compromise and therefore always involves trust and goodwill. Developing workable processes, in turn, involves sustained research, development, and evaluation of practice across the sector and in communities. Any sustained implementation of indigenous protocols is likely to require practical processes to be time and cost efficient in this sector.

When it comes to digitization and the Internet, the Protocols recognize that IP and technology issues introduce new levels of complexity for the sustainable management of indigenous materials and pose challenges for both the library and information services profession and for indigenous communities. While the Protocols suggest that cultural institutions develop coordinated policy approaches, what these should be remains unclear because of the need for sustained research. More practical information about what works and what does not, what changes in approach and direction are needed, will help fill in the current information gaps. This longer-term research on practical experiences will be invaluable for cultural institutions around the world.

### ***A Framework of Guidance for Building Good Digital Collections by NISO***

The National Information Standards Organization (NISO)<sup>298</sup> is a non-profit association accredited by the American National Standards Institute (ANSI),<sup>299</sup> for the identification, development, maintenance, and publication of technical standards to manage information in the digital environment.<sup>300</sup> It has developed a framework, which is aimed at cultural institutions and funding organizations. The framework has two objectives: “to provide: 1) an overview of some of the major components and activities involved in the creation of good digital collections, and 2) a framework for identifying, organizing and applying existing knowledge and resources to support the development of sound local practices for creating and managing good digital collections.”<sup>301</sup>

Digital collection development often requires much more than just delivering information to the public through the use of modern technologies. The NISO framework has therefore outlined several principles on what constitutes “a good digital collection.” It argues that considerations should be given to the development of:

- a collection development policy before digitizing;
- a clear description of the collection;
- a sustainability plan for the continued usability of the collection;
- an accessibility strategy for users;
- an IP management plan; and
- standardized measures of collection usefulness.<sup>302</sup>

Ideally, a digital collection should “fit into the larger context of significant related national and international digital (library) initiatives”<sup>303</sup> which could help expand the utility of the digital collections and address the important issue of sustainability.<sup>304</sup>

### ***Museum policy of New Zealand's bicultural Te Papa Tongarewa***

Te Papa Tongarewa, the National Museum of New Zealand and Archives New Zealand have a very clear set of policies.<sup>305</sup>

## **2. Good practices for Digital Archives – Protocols**

With the range of new technologies available, many digital archives are being established. Some are being created as additional means for disseminating information and research materials held in cultural institutions. Others are established as new independent archives that are distinct from the traditional archive, museum or library.

The interest for digital archives arises from their capacity to vastly increase public access to collections. For many communities, the digital archive offers new opportunities to access TCEs that have historically been inaccessible. Much cultural material is held in institutions far from source communities and the costs associated with traveling have been prohibitive for many traditional and indigenous peoples.

All digital archives face complex questions regarding the management of IP. For independent archives, these questions take on greater weight as the actual framework and/or database being used to store and/or display content will also have IP dimensions. Programmers and database designers, as well as those

people who work on the archive may have certain IP rights – and these will vary depending on the involvement and employment contract that has been arranged. Additionally, the material that is imported into the archive will almost always have a complex range of ownership/copyright questions associated with it. New challenges arise when digital archive managers have limited access to IP information and expert advice. There is a danger that digital archives will unwittingly reproduce the messy and difficult IP situations currently found within cultural institutions.<sup>306</sup>

As digital archives provide new possibilities for accessing previously inaccessible collections, particularly by the traditional and indigenous communities from whence the material derives, it is no surprise that the last five years have seen an increase in their development. Best practices are still emerging. What is critical to consider is the range of inter-connected IP issues that will arise in the development of any digital archive that incorporates TCEs.

Digital archives with potentially vast public access must use sensitivity in the development of their frameworks, determine which material will be made available and establish levels of access that can be implemented. These three key areas require deliberation prior to the establishment of the digital archive. The essential challenge for digital archives remains the extent to which they can accommodate the desires and expectations of tradition-bearers about access and control within their governing frameworks. These frameworks need to be flexible and change to fit the needs of the indigenous or traditional community as these needs also change over time. Ongoing attention to the IP dimensions of the TCEs will help ensure that digital archives do not reproduce the problems and challenges currently experienced within cultural institutions more generally.

#### ***Pacific and Regional Archive for Digital Sources in Endangered Cultures (PARADISEC)***

The potential IP problems related to digital archives management may be countered by utilizing advance agreements and protocols with the parties that are supplying cultural content for the archive.

For example, the Pacific and Regional Archive for Digital Sources in Endangered Cultures (PARADISEC)<sup>307</sup> has developed specific forms and means of documenting the material stored digitally.<sup>308</sup> It has Deposit forms for researchers who provide PARADISEC with material and it has Conditions of Access forms for those seeking access to material. The question of IP is not detailed in full – it comes under the language of “ownership” within the Deposit form – wherein it states:

##### **OWNERSHIP**

*The term ownership refers to ownership of the physical copy of the material being lodged with PARADISEC. It is not a wider claim to the intellectual property or ownership of any traditional knowledge, mythology, personal information or expression which relates to or derives from other objects, individuals or communities contained within the material being lodged. If the material was written, photographed, drawn, recorded or filmed by you, then you are the creator and owner of the physical copy of the material, or if you have collected, found or inherited the material you are the owner of the physical copy of the material and therefore you or your delegate are in a legal position to enter this agreement.*

While PARADISEC is pioneering a new kind of digital archive, attention to the IP dimensions of the project itself, and the material being incorporated into archive remains very important. A further complication, and one that needs a full discussion, is that much of the material being incorporated into the digital

archive has different copyright rights associated with it as the material comes from multiple copyright jurisdictions. This requires special attention, and in time, specific policies will need to be developed to manage the protection afforded to the various types of material within the archive.

### ***British Library Archival Sound Recordings***

The British Library has one of the largest sound archive in the world.<sup>309</sup> It is currently digitizing and posting online sound recordings made by predominantly British ethnomusicologists of traditional music from all around the world. When complete, ethnographic field recordings of around 8,000 hours worth of material will be accessible on the Internet. While carrying out this digitization process, the British Library devised some wording to place alongside all of its recordings from its Archival Sound Recordings Project to properly address potential cultural sensitivities and the interests of the source communities of these recordings. In collaboration with WIPO, the British Library drafted the following statement<sup>310</sup> with regards to ethical and permitted use of all recordings from their sound archive:

#### *ETHICAL AND PERMITTED USAGE OF RECORDINGS*

*The following statement has been prepared together with the World Intellectual Property Organization.*

*The British Library has digitized these collections of recordings and made them available purely for the purposes of safeguarding them and for making them available for non-commercial research, study and private enjoyment. The collections include culturally sensitive materials, among them ethnographic sound recordings. These recordings should not be altered or used in ways that might be derogatory to the indigenous and local communities who are traditional custodians of the traditional music, lyrics, knowledge, stories, performances and other creative materials embodied in the sound recordings.*

*While the British Library, or contributors to its collections, may be the owner of intellectual property in the digitizations of the sound recordings and in the sound recordings themselves, the Library recognizes that broader rights and interests in intangible cultural heritage, including traditional music and other creative materials embodied in the sound recordings may, under national, customary and other laws, reside with the traditional custodians of such materials. Therefore the prior informed consent of the British Library and/ or other contributing third parties, as well as the traditional custodians is required for the republication and commercial use of part or whole of these materials.*

*The British Library always seeks to take account of cultural sensitivities and any religious or other restrictions in the recordings it possesses and/or owns. Where possible, the location and date of the recording, the names of original performers and traditional custodians of the music, and the lyrics, knowledge, stories and performances embodied in the sound recordings have been identified. The Library takes considerable care not to distort or alter this underlying material in any derogatory way. In the event, however, that any community or community representative feels aggrieved by the digitization and making available of these materials, the British Library invites such community to contact it via the link below in order to resolve the matter amicably through mutual discussion.*

### ***Musée du Quai Branly: Conditions for Placing Material on the Internet***

Created in 1996 and inaugurated in 2006, the Quai Branly Museum showcases representative cultural artifacts from the arts and civilizations of Africa, Asia, Oceania and the Americas.<sup>311</sup> It is designed to serve as a forum for scientific and artistic dialogue, and has defined its mission as “*participating in national and international efforts to preserve the tangible and intangible heritage of these societies.*”

In addition to possibilities for display and study in the Museum’s public areas, the resource center and the documentation and archives center, the collections are also available online. The conditions for accessing online documents are set out on the Museum’s website. Generally, when material is placed online, all authors, subjects (persons represented in the documents) and other beneficiaries must be previously consulted and their rights negotiated. Such a procedure (that is materially impossible for collections of this scope) could have jeopardized online distribution. The Museum has therefore opted to place online, next to the digitized documents, a complaint form to show its good faith. Two forms are available for download in order to clear copyrights and rights for images: the *Declaratory Note for authors and non-identified beneficiaries of the works distributed*<sup>312</sup> and the *Authorization for the reproduction and representation of photography*.<sup>313</sup> The wording of these forms is the outcome of an internal brainstorming process on IP issues under the aegis of the museum’s Internet Committee, which brought together the departments for research, heritage and cultural development, as well as the legal unit. With these forms, the authors, subjects and beneficiaries may exercise their claim to the material on the website, as the museum sees fit, in accordance with the provisions of the French Code of Intellectual Property. At time of drafting, no complaints have been submitted via these forms. It should be noted however that this practice should be used with caution. It would sometimes be preferable to do a diligent search for potential right owners or other beneficiaries of protection prior to the online posting.

### ***Archives and Research Centre for Ethnomusicology, American Institute of Indian Studies***

The Archives and Research Centre for Ethnomusicology of the American Institute of Indian Studies (the ARCE) was established in India in 1982.<sup>314</sup> Its principal objective was to create a centralized archive of recordings of Indian music and oral traditions for preservation and access in India. It was initially founded to bring to India collections held in archives and by individuals outside India. To date, the ARCE houses 194 collections voluntarily deposited, comprising about 13,000 hours of unpublished recordings.

From the very beginning ARCE used legal agreements and release forms. They were based on similar agreements used by folklife and ethnomusicology archives in the United States of America, but adapted to address certain specific Indian concerns. For example and very succinctly, there is a formal agreement for deposit which allows the depositor or designee to choose from three options – one that allows no access for a fixed amount of time, one that allows listening or viewing in ARCE premises and a third that allows copies to be allowed for research and teaching, with no permission to make further copies. In this latter case, the ARCE charges a reasonable technical fee for making the copy with the media supplied by the requestor. The forms are only “models” and their use has evolved over the years, by mutual consent of depositors and the ARCE.

Furthermore, ARCE participates in the Smithsonian Global Sound project. Permission for each digital sound recording track contributed by ARCE is obtained from the collector or depositor as well as from the performer, who is given an advance royalty for 125 downloads.

Currently, ARCE has embarked on a project called Archives and Community Partnership where the recordings, rights and revenue are being shared between ARCE and the communities.

### 3. Good Practices from Indigenous Peoples and Traditional Communities – Codes of Conduct and Protocols for Behavior

As indigenous and traditional communities are increasingly being recognized as having legitimate opinions about how TCEs and TCE collections should be managed, several of these communities are developing their own guidelines, codes of conduct and protocols. They are setting their own standards and safeguards for how research should be conducted, what IP rights will remain with the community and where permissions for use into the future will be required.

For many cultural institutions, problems arise because there is insufficient information about the source community, which hinders negotiations and consultations about the use of and possible access to TCEs by third parties. The policies and protocols that are being established by source communities directly seek to counter such problems.

These protocols also set a new platform for negotiating agreements and respectful exchanges between researchers, institutions and communities alike. Researchers negotiate directly with the communities; the outcomes of such negotiations are then passed on to cultural institutions, which can use them to establish correct management for the material. The information that is supplied is invaluable for the future management of these collections, as it provides the most direct guidance from the community itself.

#### ***Hopi Community – HCPO Policy and Research***

The Hopi Community, located in Arizona, United States of America, has extensive experience with the unauthorized and illegitimate use of its cultural heritage. As a result of historic treatment of the Hopi people and culture, the Hopi now enforce strict controls about how outsiders are to behave when they are within Hopi communities.

For example, unless consent has been secured from the Hopi Cultural Preservation Office (HCPO), there is no recording of any kind allowed. This includes picture-taking, video recording, audio recording, sketching, and note-taking. Such forms of documentation are strictly prohibited especially during ceremonies. As the information provided for visitors explains, “publication of these observations and/or recordings is both exploitative and prohibited without prior consent from the Hopi Cultural Preservation Office.”<sup>315</sup>

The need for such controls is described in the following way:

*Through the decades the intellectual property rights of Hopi have been violated for the benefit of many other, non-Hopi people that has proven to be detrimental. Expropriation comes in many forms. For example, numerous stories told to strangers have been published in books without the storytellers' permission. After non-Hopis saw ceremonial dances, tape recorded copies of music were sold to outside sources. Clothing items of ceremonial dancers have been photographed without the dancers' permission and sold. Choreography from ceremonial dances has been copied and performed in non-sacred settings. Even the pictures of the ceremonies have been included in books without written permission. Designs from skilled Hopi potters have been*



*duplicated by non-Hopis. Katsinas dolls have also been duplicated from Hopi dancers seen at Hopi. Although the Hopi believe the ceremonies are intended for the benefit of all people, they also believe benefits only result when ceremonies are properly performed and protected.*<sup>316</sup>

These guidelines establish norms for behavior within the community by visitors and seek to inform non-Hopi people about the problems of the past, and how such actions have necessitated the current controls that the Hopi now observe. Again, IP issues rub shoulders with ethical frameworks of action.

To further help visitors and non-Hopi understand expected modes of conduct, the HCPO has developed a "Protocol for Research, Publications and Recordings." This Protocol explains how the Hopi people would like their intellectual resources and TCEs to be used by others. Among other things, the Protocol states that prior informed consent is required for any project or activity involving Hopi intellectual resources; the use of recording devices is restricted; and, informants and subjects of a project or activity should be "justly compensated," which could include "acknowledgement as author, co-author or contributor, royalties, copyright, patent, trademark, or other forms of compensation."

In addition to the Protocol, the Hopi Tribe has been very active in related projects concerning the preservation and digitization of its cultural heritage. These projects are initiated in order to prevent any dissemination of knowledge and information without the prior informed consent of the Tribe. A good example is the Hopi Oral History Project which is recording the history and cultural traditions of the Hopi. Another project involves the preservation of the Hopi language, the Hopilavayi Project.

#### ***Navajo Nation – Guidelines for Visitors***

In similar circumstances to the Hopi, the Navajo Nation has guidelines for behavior for visitors to the community. These also include restrictions on recording and documentation. Importantly, these guidelines are not about absolute restriction – rather, they are about setting standards, and establishing processes for dialogue and engagement. Importantly they emphasize that the people who are part of the Navajo Nation have the right to decide when and how documentation of the community takes place. Currently the Navajo Nation is implementing the *Navajo Nation Un-authorized Recording Act 2007* (Legislation No. 0836-07).<sup>317</sup>

#### **4. Examples of Current Practices by Cultural Institutions – Frameworks, Protocols, Guidelines and Agreements**

IP law often falls short of meeting the needs of indigenous and traditional peoples in relation to the protection of TCEs. Nevertheless, a range of innovative strategies has been and is currently being crafted to respond to the substantive gaps within the current legislation. These strategies are not singularly IP focused. They engage with the diverse inter-relationships among researchers, indigenous peoples and traditional communities and cultural institutions. For instance, some strategies recognize that greater information about correct ways of behaving when visiting a community will directly affect which documentary practices are assumed to be appropriate.

These relationships are key to preserve and disseminate information in an environment furnished by diverse concepts of knowledge. They tend to be long-term, often lasting through and beyond the professional lifetimes of the specialists, indigenous and non-indigenous, concerned. An understanding of correct behavior is basic to the entire process. What is often missing is the formalization of this knowledge



in terms capable of being understood by non-specialists and translated into protocols that can work with and effectively influence the broader protocols of the institution.

The strategies reflect a change of approach and a realization that legislation alone is not enough: improved relationships are needed to enable new directions for to the successful documentation, collection, storage, management and dissemination of TCEs. Significantly, tradition-bearers have a central role in these discussions. Guidelines, codes of conduct and protocols offer new information about what is important to indigenous and traditional communities and how the management of collections can be improved. They are established with flexibility for each context.

Nonetheless a case-by-case approach may always be necessary to some extent, even in the presence of guidelines and protocols. Cultural institutions with a legal mandate to hold material “in trust for all” will always have to balance the obligation to reserve stored information for a particular originating group against the requirement not to discriminate among members of a plural population. Demographic dispersal, intermarriage, gradients from “more orthodox” to “less orthodox,” political factionalism, and the existence of specific religious or cultural groups with strong interests in certain material but memberships that do not coincide with the originating populations will always generate challenges for both cultural institutions and indigenous and traditional societies that seek a single, authoritative management path. Some cultural institutions have become keenly aware of these issues and have found creative collaborative solutions to issues that have seemed to defy standard approaches.

These examples show the range of good practices – particularly in institutional and independent research sites.

### ***Fiji's Indigenous Affairs Ministry***

The then Ministry of Fijian Affairs, Culture and Heritage, now the Ministry of Indigenous Affairs and the Department of Culture and Heritage of Fiji has actively developed practical and policy measures to preserve and safeguard Fiji's cultural heritage, with the aim to “strengthen the conservation, preservation, promotion and protection of all forms of cultural and natural heritage. These include intangible and tangible, movable and immovable heritage, and cultural industries.”<sup>318</sup>

Guidelines and manuals have been published to advise researchers on how to conduct research involving Fiji's cultural heritage. One example is the “Training Manual on Field Research Methodology Designed for Cultural Mapping Field Officers.” The manual contains information on the steps to take and issues to address when conducting research. The manual includes guidance on IP questions, based on the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) (the South Pacific Model Law) which WIPO assisted in drafting.

Another example is the “Recommended Guideline for Socio-Cultural Researchers when Undertaking Fieldwork in Cultural Settings.” This Guideline introduces socio-cultural researchers to ethical aspects of conducting anthropological research. Two main issues emphasized throughout the Guideline – both of which are related to IP issues – are the need for consent<sup>319</sup> and awareness-raising.<sup>320</sup>

The Guideline is part of the completed Framework for Research on Indigenous Fijians which was developed by the Institute of Fijian Language & Culture of the Ministry of Indigenous Affairs and currently in its consultative stage. The framework captures research as perceived by the local, culturally appropriate

research methodology, reciprocating the assistance rendered by the informants and locals during research, respect for local ethical principles when accessing TCEs, IP protection and the setting up of a formalized resource center and archive for collections. The Framework proposes to engage and work with all stakeholders, both government and non-government, to build general consensus on the need to safeguard the rights of indigenous Fijians in their TCEs. Simultaneously, it is the ultimate goal of the Framework to engage cultural and non-cultural institutions into appreciating indigenous knowledge systems, worldviews and minimize misuse of local customary practices, language and values.

While earlier arguments have concentrated at least against the idea of government institutionalization of documentation, collection and archiving of TCEs due to bureaucracy and related limitations, the Fiji initiative is a living example of how to reverse the often top-down approach and move towards more grassroots participation, involvement and inventiveness of the indigenous and traditional communities themselves. Since the communities are the owners of the TCEs, the government only acts as a facilitator of the databases.

### ***The Vanuatu Cultural Centre***

The Vanuatu Cultural Centre consists of a National Photo, Film and Sound Archive, a National Museum, a National Library and the National Cultural and Historic Sites Register. Its collections therefore include cultural artifacts, photographs, film and audiovisual recordings, information pertaining to cultural sites and other historical items. Furthermore, as part of its functions, it is responsible for managing and safeguarding the cultural heritage of Vanuatu. The Centre also provides for fieldwork projects and cultural research, in which the Centre collaborates with local communities in cultural heritage management.

From a policy and legal perspective, the Centre plays an active role at the national level. The Centre has taken policy and legal measures in response to growing concerns from local communities. For instance, the Centre has a Vanuatu Cultural Research Policy,<sup>321</sup> which addresses certain important aspects to be considered before any research can commence. This includes, among other things, understanding Vanuatu's "kastom." Researchers must also respect "traditional copyright protocols" protected and enforceable under Vanuatu's Copyright Act. The Policy further includes a "Research Agreement," which needs to be completed and signed by the prospective researcher and the Cultural Centre.

Another measure developed by the Cultural Centre followed the intensification of the commercialization of the Nagol or Pentecost land dive ceremony. This ceremony had attracted the attention of many third parties, in particular commercial film crews and tour operators. The immense attraction of this unique TCE also caused the ceremony to be performed every Saturday in April and May of each year instead of the original once or twice a year. The tradition therefore risked becoming solely a "commercial attraction" with only very limited cultural significance. The traditional communities had consequently argued that the "commercial attraction and activities" (such as filming) distorted the traditional ceremony and that there also was a lack of transparency and fairness in the remuneration paid by the third parties to these communities.

In order to address this particular case, the Center started developing policies and legal measures, which include a moratorium on all filming of the ceremony, based on Section 6.2.i of the Vanuatu National Cultural Council Act, which confers the right to regulate filming by foreign companies in the country. This moratorium is an initiative of the Centre to persuade all parties involved to engage in the long-term process of developing a coordinated Management Plan for the tradition. The objectives are to preserve the

cultural meaning of the tradition, to secure the transmission of TCEs to future generations, and to promote the acknowledgement of customary owners through a distinct legal entity. In other words, besides safeguarding and preserving TCEs, the IP rights of customary owners would be made known and respected.

### ***Reproduction Rights Organizations***

Retaining copyright in a work is a struggle for all creators especially as new technologies enable the reproduction of infinite copies. Reproduction Rights Organizations (RROs) are in operation throughout the world to funnel royalties back to authors and artists. RROs generally also encourage the creation of new RROs; facilitate agreements between and on behalf of their members; and increase public awareness of copyright and the role of RROs in managing rights and fees.<sup>322</sup>

However, many uses that are acceptable for most copyrighted works sometimes conflict with appropriate uses of TCEs, as determined by the source community. There are a few specialized RROs established around the world that endeavor to cater to the specific needs of indigenous and traditional communities.

These RROs have the capacity to play an important role in advancing and advocating for the interests of tradition-bearers within specific areas of the market. The Aboriginal art market is one example. Specialized attention means that when there are instances that require different circumstances for reproduction and circulation of works, these can be monitored and addressed.

As far as strategy for protection and control is concerned, RROs appear to be far more consonant with the current situation of indigenous peoples and traditional communities in plural societies, national or transnational, than the “traditional” and “culture/community” protection approach.

One example is the Aboriginal Artists Agency in Australia:

*Aboriginal Artists Agency Limited is a non-profit organization. It was established in 1976 by the Australian Government through the Australian Council for the Arts and subsidised until 1986. Since then it has operated independent of any funding source; commissions of between 15-25% generate sufficient income for the company to be self-sustaining.*<sup>323</sup>

Another example is Sámikopijja, the Sámi reproduction rights organization. One of Sámikopijja’s most interesting facets is its transjurisdictional nature; it represents Sámi members in Finland, Sweden, Norway and Russia. Sámikopijja has had a reciprocal agreement with Kopinor, the Norwegian RRO, since 1994, guaranteeing that Sámi rights owners receive one percent of the net remuneration Kopinor claims annually.<sup>324</sup> An organization like Sámikopijja is exceptional in that it represents indigenous interests across national political borders.

## 5. Standard Agreements, Consent Forms, Licenses and Undertakings

Some communities have put in place standard agreements and forms which any prospective user needs to sign.

### *License Form, Consent to Access to and Use of Historical Materials by DISA and Aluka*

The Digital Innovation South Africa initiative of the University of Kwa-Zulu Natal (DISA)<sup>325</sup> and the Aluka initiative of Ithaka Harbors, Inc. (Aluka)<sup>326</sup> have launched projects intended to preserve “historical materials” in digital or electronic form and to make these available online “for scholarly, educational and other non-profit cultural purposes.”<sup>327</sup> For this purpose, DISA and Aluka have developed a license form for custodians and/or rights owners to engage in a non-exclusive royalty-free license agreement with DISA and Aluka.

The agreement with interested custodians specifically provides DISA and Aluka with “access to the historical materials for the purpose of creating digital images”<sup>328</sup> whereas any agreement concluded with the rights owners would entail providing DISA and Aluka with their permission to 1) create digital reproductions of the historical materials, 2) preserve the digital images in DISA archives, 3) modify or adapt the digital images for preservation, translation, quality control, delivery and other purposes, 4) distribute or make publicly available copies to DISA’s and Aluka’s authorized users for educational, scholarly and other non-profit cultural purposes, 5) distribute a limited number of the digital images in printed form, 6) make copies for loss of data purposes, and 7) use any technology and means for reproduction, archiving, modification and distribution purposes.<sup>329</sup>

In any such agreement, consent given to DISA and Aluka is considered as non-exclusive and a possibility exists for the participating custodians and rights owners, upon their request, to be identified and acknowledged in relation to their materials on the DISA and Aluka websites.

### *The Laura Aboriginal Dance and Cultural Festival*

A further example of how agreements have helped within the TCE context is in the Laura Aboriginal Dance and Cultural Festival, a biannual celebration of indigenous Australian song, dance and music.<sup>330</sup>

The Laura Festival is the longest running continual Aboriginal cultural festival in Australia. In 1998 it was revealed that certain images of dancers from the Wik community were being reproduced commercially without permission. Photographs were available on CDs, postcards and other products. Since these images are only suitable for reproduction upon permission by those with appropriate cultural status, the reproductions were deemed to be culturally offensive.

Under Wik customary law, the right to control elements of a ceremony of performances rests with specific individuals, namely senior custodians or elders. Under Australian copyright law, like most copyright laws, the copyright in the images of the dancers vested in the photographer (who is the author for copyright purposes). Had the dancers known this, they would not have allowed any photography during the performance or would have reconsidered performing at the Festival.<sup>331</sup> This highlights the need to provide information to tradition-bearers about the range of rights that may exist in a performance and, when a performance is documented, the performers themselves need access to IP information in order to make informed decisions.

Since 1998, the organizers of the Laura Festival have adopted a written agreement concerning all photography and filming at the Festival. The agreements contain terms requiring that consent be obtained from the performers and that certain conditions for control of commercial photography be followed. Approved photographers sign an agreement stating that any commercial photography will be undertaken only after consent of the performers is received.

## Notes

- <sup>1</sup> For information on the Creative Heritage Project, see <http://www.wipo.int/tk/en/folklore/culturalheritage/> (last accessed April 14, 2010)
- <sup>2</sup> Surveys, <http://www.wipo.int/tk/en/folklore/culturalheritage/surveys.html> (last accessed April 14, 2010)
- <sup>3</sup> Rina Pantalony, WIPO Guide on Managing Intellectual Property for Museums, 2008. This book is available at: [http://www.wipo.int/copyright/en/museums\\_ip/guide.html](http://www.wipo.int/copyright/en/museums_ip/guide.html) (last accessed April 14, 2010).
- <sup>4</sup> Database, [http://www.wipo.int/tk/en/folklore/creative\\_heritage/index.html](http://www.wipo.int/tk/en/folklore/creative_heritage/index.html) (last accessed April 14, 2010)
- <sup>5</sup> Biographical details and surveys are available at <http://www.wipo.int/tk/en/folklore/culturalheritage/surveys.html> (last accessed April 14, 2010)
- <sup>6</sup> This example was first published in J. Anderson, *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use*, Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena, American Library Association and The MacArthur Foundation Columbia University, New York, May 5-7 2005. Paper available at <http://correctingcourse.columbia.edu/program.html> (last accessed February 22, 2010)
- <sup>7</sup> A. Corn with N. Gumbula, "Nurturing the Sacred through Yolngu Popular Song" (2002) 2(69) Cultural Survival.
- <sup>8</sup> *Ibid.*
- <sup>9</sup> *Ibid.*
- <sup>10</sup> Fair dealing in Australian copyright law does not take into account the purposes for which the copy is meant to be used. For exceptions under fair dealing see Copyright Act 1968 (Cth) Section 40-47H. For provisions for libraries and archives see Section 48-53.
- <sup>11</sup> In certain instances she contends that an institution has no right to display her holdings in its online catalogue.
- <sup>12</sup> The publication deals with the TCEs of both indigenous peoples and traditional communities. Traditional communities, although they may share some characteristics with indigenous peoples, are not "indigenous" in the usual sense. This distinction is particularly relevant to those countries in the "New World" which were (re)populated through the forced movement of people, as well as by massive immigration. These have resulted in the evolution of societies in the Caribbean, for example, where retention of African and Asian cultures have impacted on the societies in which they have been transplanted. Examples of traditional communities include the Amish of Lancaster County, Pennsylvania, USA; the Hassidim of Brooklyn, New York, USA; the Vietnamese fishermen of the Mississippi coast, USA; the Caboclos (people of Brazilian Amerindian and European descent) of Brazil; or the Afro-Brazilians of Brazil. Moreover, it should also be stressed that indigenous peoples and traditional communities do not constitute a unit; variability within peoples and communities, as well as cultural differences between peoples and communities do exist and must be taken into account.
- <sup>13</sup> See, e.g., J. Anderson, "The Making of Indigenous Knowledge in Intellectual Property Law in Australia" *International Journal of Cultural Property*, 12(2); and E. Hudson, "Cultural Institutions, Law and Indigenous Knowledge: A Legal Primer on the Management of Australian Indigenous Collections," *Intellectual property Research Institute of Australia, University of Melbourne*, 2006, p. 1-2.
- <sup>14</sup> J. Anderson, *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use*, op. cit. note 6
- <sup>15</sup> In particular, rural non-literate communities, minority groups and other tradition-bearers who do not have any understanding of the IP regime of the country in which they reside, often fail to understand the potential value of what they are giving away.
- <sup>16</sup> See K. Bowery and J. Anderson, 'The Politics of Global Sharing? Whose Cultural Agendas are Being Advanced?' *Social and Legal Studies*; T. Flessas (2008), 'The Repatriation Debate and the Discourse of the Commons' *Social and Legal Studies* 17(3): 387-405.
- <sup>17</sup> See, e.g., Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* (Basic Books, 1998); Martin Bailey, *Don't Return Artefacts to Nigeria*, *The Art Newspaper*, Jan. 10, 2000; Martin Bailey, *The Met and Louvre are Behaving Unethically*, *The Art Newspaper*, Jan. 9, 2001; Kate Fitz Gibbon, *Who Owns the Past?: Cultural Policy, Cultural Property, and the Law* (Rutgers University Press, 2005).
- <sup>18</sup> Although museums', libraries' and archives' collections necessarily refer to past events, cultures are in a constant process of making and changing, unless the populations are extinguished. Hence new values and uses can be attributed to cultural testimonies of one's own or another group's culture.
- <sup>19</sup> See, e.g., J.H. Merryman and A.E. Elsen, *LAW, ETHICS AND THE VISUAL ARTS*. Chapter 3, *Who Owns the Past?* Kluwer Law International (4<sup>th</sup> ed., 2004). See also *The International Bureau of the Permanent Court of Arbitration, RESOLUTION OF CULTURAL PROPERTY DISPUTES*. Kluwer Law International (2003).
- <sup>20</sup> Arguably, the central issues of rights go well beyond whether or not copyright to a book or photograph is still in effect.

- <sup>21</sup> United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 31. Although the Declaration has been adopted, it is not a legally binding document.
- <sup>22</sup> United Nations Declaration on the Rights of Indigenous Peoples, 2007, Article 12(1).
- <sup>23</sup> See <http://www.un.org/esa/socdev/unpfii/> (last accessed March 18, 2010).
- <sup>24</sup> For example, in certain cases where TCEs have been documented and incorporated into, say a sound-recording or a film, TCEs can indirectly benefit from IP protection (the recording or film as such may be protected by copyright and/or related rights, but not the underlying TCE).
- <sup>25</sup> As we shall see in more detail in Part III, some cultural institutions have policies and even legal provisions in their constituting statutes, which relate to TCEs and relationships with indigenous and traditional communities. Moreover, there are legal frameworks in place in some jurisdictions.
- <sup>26</sup> For an academic account of the emergence of these issues see J. Anderson, *LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW* Edward Elgar Press (2008).
- <sup>27</sup> In October 2005, UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. It defines cultural diversity as “the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.” See [www.unesco.org/culture/en/diversity/convention](http://www.unesco.org/culture/en/diversity/convention) (last accessed February 26, 2010).
- <sup>28</sup> For the purposes of this publication, WIPO’s working description is used. It must be noted that “TCEs” is a term that has replaced, within WIPO, the controversial, albeit more concise, term “folklore.”
- <sup>29</sup> Despite its potential, IP has not been widely used to protect TCEs. As the Group of Countries of Latin America and the Caribbean pointed out in 2001, “the resources offered by intellectual property have not been sufficiently exploited by the holders of traditional cultural knowledge or by the small and medium-sized businesses created by them.” (Position Paper submitted to the IGC in 2001 by GRULAC (Group of Countries of Latin America and the Caribbean), WIPO/GRTKF/IC/1/5, Annex II, page 2.)
- <sup>30</sup> See for example T. Janke, WIPO, “Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions”, WIPO Publication No. 781; WIPO, “Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore,” WIPO Publication No. 785, pp. 35 to 44. For an application of these principles under Chinese law, see for example *The Local Government of Ethnic Hezhe Sipai Village, Heilongjiang Province v. Guo Song and Chinese Central Television and Beichen Shopping Centre of Beijing*, case No. 246, 2003, Beijing Higher People’s Court.
- <sup>31</sup> See Berne Convention for the Protection of Literary and Artistic Works (1886), available at [http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf) (last accessed April 14, 2010). As of February 26, 2010, 164 countries are contracting parties to the Berne Convention.
- <sup>32</sup> T. Janke, “Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights” (1999), 209; Department of Communications, Information and the Arts, Report of the Contemporary Visual Arts and Craft Inquiry (2002), 166.
- <sup>33</sup> WIPO Performances and Phonograms Treaty, 1996. See <http://www.wipo.int/treaties/en/ip/wppt/> (last accessed April 14, 2010)
- <sup>34</sup> M. Talakai, “Tongan Cultural Expressions and Its Intellectual Property Challenges: Findings from a Survey on Intellectual Property and Safeguarding Cultural Heritage in the South Pacific and from PhD Dissertation Fieldwork in Tonga,” presentation made at Tonga Research Association Conference, Nuku’Alofa, Tonga, July 2007, available at <http://www.wipo.int/tk/en/folklore/culturalheritage/resources.html> (last accessed April 14, 2010)
- <sup>35</sup> L.C.R. de Davis, “Régimen Especial de Derechos de Propiedad Intelectual de los Indígenas de Panama”, Presentation made at Fourth Session of WIPO IGC, December 2002, WIPO/GRTKF/IC/4/INF 4, [http://www.wipo.int/edocs/mdocs/tk/es/wipo\\_grtkf\\_ic\\_4/wipo\\_grtkf\\_ic\\_4\\_inf\\_4.doc](http://www.wipo.int/edocs/mdocs/tk/es/wipo_grtkf_ic_4/wipo_grtkf_ic_4_inf_4.doc) (last accessed April 14, 2010)
- <sup>36</sup> It should be noted that Creative New Zealand is no longer investing in managing and promoting toi iho™, a trademark denoting the quality and authenticity of Maori art. For more information, see <http://www.toiio.com/> (last accessed February 26, 2010).
- <sup>37</sup> See generally WIPO, Consolidated Analysis, *op. cit.* note 30. It should be noted that some studies have shown, however, that even when outsiders know something is not authentic, they may purchase the cheaper “knockoff” item, rather than the more expensive “authentic” item. The issue is indeed far deeper than outsider awareness.



- 38 "Defining Fiji's Art," *Living in Fiji*, September-November 2006.
- 39 This type of system is used to either complement or substitute conventional IP regimes. It is characterized by an emphasis on communal rights, perpetual protection and the absence of the fixation requirement.
- 40 Indigenous Peoples Rights Act of 1997.
- 41 The Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000, establishes a registration system for TCEs. A special office has been created within the country's IP office to approve the applications and maintain the register. The procedure before the IP office does not require the services of a lawyer and there are no application fees.
- 42 See the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999.
- 43 Under the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002, "traditional owners" have the right to authorize or prevent, among others, the adaptation, transformation and modification of the protected TCEs. An external user must receive consent to make new derivative works (works based upon a TCE). Any IP rights in derivative works vest in the work's author. However, if the work is used for commercial purposes, the rights-holder must share benefits with the traditional owners, acknowledge the source of the TCEs and respect moral rights in the TCEs.
- 44 See WIPO, Consolidated Analysis, *op. cit.* note 30, pp. 35 to 55 and Annex. See also WIPO TCEs Laws Database at <http://www.wipo.int/tk/en/laws/folklore.html> (last accessed April 14, 2010) and the Bandung Declaration on the Protection of Traditional Cultural Expressions, Traditional Knowledge, and Genetic Resources, available at <http://www.ipwatch.org/files/Bandung%20Declaration.doc> (last accessed February 26, 2010).
- 45 Current drafts are published as WIPO Documents WIPO/GRTKF/IC/17/4 (TCEs) and WIPO/GRTKF/IC/17/5 (TK). Available at [http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=20207](http://www.wipo.int/meetings/en/details.jsp?meeting_id=20207) (last accessed November, 2010)
- 46 Communities that feel associated to (collections of) TCEs in some cases mainly have a historical relationship to them, while in other cases the values vested in the TCEs concerned are still claimed to be those of the community in question, that in many cases still are enacting elements of their intangible TCEs and/or producing elements of their traditional tangible TCEs.
- 47 See note 45.
- 48 Draft Provisions, article 5(i)(c)(vi). It should be noted that it is still debated whether it is in indigenous and traditional communities' interests to make such recordings. It is argued that asking for prior informed consent is more consistent with customary law and may help build better relationships.
- 49 Draft Provisions, article 7(2)(a). This provision may still need to be analyzed to see whether this would constitute a permissible exception to copyright and related rights law under international law.
- 50 See The Smithsonian Global Sound Project, WIPO Case Study, available at [http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/smithsonian\\_project.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/smithsonian_project.pdf) (last accessed April 14, 2010)
- 51 See <http://www.smithsonianglobalsound.org/> (last accessed March 10, 2010)
- 52 The majority of the collection was originally issued on long playing (LP) recordings by Folkways Records of the International Library of African Music, and was already "preapproved" for Internet distribution. It was thought not to be desirable to place entire collections online.
- 53 B. Braiker; *Newsweek*; June 10, 2005.
- 54 See M. Skrydstrup, *Towards IP Guidelines and Best Practices for Recording and Digitizing Intangible Cultural Heritage: A Survey of Codes, Conduct and Challenges in North America*, WIPO, 2006, available at [http://www.wipo.int/tk/en/folklore/culturalheritage/casestudies/skrydstrup\\_report.pdf](http://www.wipo.int/tk/en/folklore/culturalheritage/casestudies/skrydstrup_report.pdf) (last accessed April 14, 2010)
- 55 For some examples of misappropriation, see *Minding Culture*, *op. cit.* note 30
- 56 See Sandler, Felicia, "Music of the Village in the Global Marketplace – Self-Expression, Inspiration, Appropriation, or Exploitation?" Ph.D. Dissertation, University of Michigan, 2001, pages 58 and 59. See also Mills, "Indigenous Music and the Law: An Analysis of National and International Legislation" 1996 *Yearbook for Traditional Music*, 28 (1996), 57 to 85.
- 57 See *Minding Culture*, *op. cit.* note 30, Case Study 6.
- 58 E. J. Brandl, *Australian Aboriginal Paintings in Western and Central Arnhem Land: Temporal Sequences and Elements of Style in Cadell and Deaf Adder Creek Art*, Aboriginal Studies Press, Canberra 1973.
- 59 This was never admitted to by the manufacturers of the t-shirts.



It should be noted that inequality and oppression are not unique to the relationships between nations and indigenous peoples. The inequalities of social class, cultural hierarchy, ethnicity, and education also profoundly affect non-indigenous collections as well.

Tangible expressions were and are usually produced within the communities (and usually collected by outsiders) and materializations of tangible and intangible expressions and practices used to be produced largely by outsiders. Tangible expressions may be documented, reproduced/copied and disseminated; materializations of intangible expressions may be copied and disseminated. All materials may be studied, written about, used and presented in information carriers of different types (books, brochures, websites, databases, etc.).

Precious examples of the enactment of traditional practices by and for the communities themselves while using objects held in museums can be found in Miriam Clavir, *Preserving what is valued: museums, conservation, and First Nations*, Univ. British Columbia Press, 2002.

WIPO Guide on Managing Intellectual Property for Museums, *op. cit.* note 3

See for example the Preambles of the WCT and WPPT which distinguish between authors' rights and the larger public interest. See <http://www.wipo.int/treaties/en/ip/wct/> and <http://www.wipo.int/treaties/en/ip/wppt/> (last accessed April 14, 2010)

Calls are being made to bring IP law up to speed with new cultural and economic realities, as a consequence of the process of decolonization. The balance will likely be reassessed given the changing cultural context of globalization.

See the United Nations Permanent Forum on Indigenous Issues for an indication of the diversity of Indigenous peoples histories, laws, concerns and expectations for justice. It should be noted that indigenous and traditional communities do not always speak in one voice. Communities that might be characterized by a distinct set of TCEs are not always homogeneous as to opinions, wishes and claims concerning the ownership, exploitation and other aspects of TCEs. Occasionally cultural institutions will have to deal with conflicting claims coming from a specific community. Moreover, within many once "traditional" communities, processes of individualization are rampant. This leads to situations in which individuals start claiming ownership – and rights – in specific TCEs that traditionally were considered as belonging to the whole community, or that are still being considered as such by some in the community.

See the Berne Convention, *op. cit.* note 31, As of February 26, 2010, 164 countries are contracting parties to the Berne Convention.

One should bear in mind the provision of Article 7(8) of the Berne Convention concerning duration, which is an exception to the principle of national treatment. Article 7(8) states that: "In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work." This is the rule, unless a country specifically states that it applies national treatment.

The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco, April 15, 1994.

As of February 26, 2010, 153 countries are members of the WTO.

As of February 26, 2010, the WCT has 88 contracting parties.

J. Anderson, *Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use*, *op. cit.* note 6

Other branches of IP law may be more useful in protecting a work's "style," such as the common law tort of passing off. The tort of passing off protects the goodwill of a trader from a misrepresentation that causes damage to goodwill. It prevents one person from misrepresenting his goods or services as being the goods and services of another, and also prevents one person from holding out his goods or services as having some association or connection with another when this is not true. See Wikipedia entry for "Passing Off": [http://en.wikipedia.org/wiki/Passing\\_off](http://en.wikipedia.org/wiki/Passing_off) (last accessed March 10, 2010).

It should be mentioned that originality in copyright does not mean the same thing as "novelty" as it is understood in patent law, which requires that the claimed subject matter was not disclosed before the date of filing (or date of priority) of the patent application.

See e.g., *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) a decision from the US Supreme Court [The sine qua non of copyright is originality. However, the standard for creativity is extremely low. It only needs to possess a "spark" or "minimal degree" of creativity to be protected by copyright], and *Desktop Marketing Systems Pty Ltd v Telstra Corporation Limited* [2002] FCAFC 112 (15 May 2002) a decision of the Federal Court of Australia. [Common law historically granted copyright in directory and other "list" cases on the basis of sweat of the brow, irrespective of any "creative" element in arrangement/selection of the list.]

*Duchamp's Urinal Tops Art Survey*, BBC News, International Version, Dec. 1, 2004.

See, e.g., *Borrowed Elements in Art*, VCEART Ideas about Contemporary Art, available at <http://www.vceart.com/explore/ideas/page.2.html> (last accessed March 10, 2010).

See Wikipedia article on Tetris, <http://en.wikipedia.org/wiki/Tetris>, (last accessed March 10, 2010).

- 79 In the case of use of symbolic codes by members of a cultural community, a new utterance (song lyrics, drawing, weaving pattern, etc.) is accepted as legitimate and verisimilar because it follows the grammar of the cultural language (verbal, pictorial, musical. etc.); it is not necessarily based on a previous iteration, e.g., musical or choreographic improvisations and sung duels.
- 80 It should be stressed however that the issue is not that the people making the knockoffs want IP protection in their works; it is that the traditional communities and indigenous peoples want to prevent the knockoffs even though the knockoffs do not copy the “expression” as defined by copyright law, but merely the idea.
- 81 *M\*, Payunka, Marika & Others v. Indofurn Pty Ltd*, 30 IPR 209 often dubbed the “Carpets case.”
- 82 The tags suggested that the works had been made with Aboriginal involvement, and that any royalties would be returned the communities involved. The court found that this was misleading conduct under the Trade Practices Act (1974).
- 83 In three of the carpets, determining direct copyright infringement was a little more difficult. See discussion in J. Anderson, LAW, KNOWLEDGE, CULTURE, *op. cit.* note 26.
- 84 Judge von Doussa relied upon *Williams v. Settle* [1960] 1 WLF 1072 at 1086-7. Part of the award was given in consideration of the personal hurt and cultural harm. The judge considered that the misuse of the artwork caused great upset and cultural harm to the artists. The court noted that the standing of the artist within his or her community could have been affected given the nature of the reproduction and the fact that the prior consent of the group was not sought or given. This was because, regardless of whether the artists authorized the reproduction of their artworks on carpets, they were responsible under Indigenous law for the transgression that had occurred. They were also liable to be punished for this transgression.
- 85 See *Minding Culture*, *op. cit.* note 30.
- 86 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
- 87 *Id.*, at 196. The *Bridgeman* case specifically addressed photographs of two-dimensional public domain artwork; how it could apply in other artistic media is uncertain. The court made a strong distinction between technical skill and artistic originality. While producing quality photographs of artworks requires a high degree of skill, the court stated: “Elements of originality [...] may include posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved. [...] As the Supreme Court indicated in *Feist*, “sweat of the brow” alone is not the “creative spark” which is the *sine qua non* of originality.” (36 F. Supp. 2d 191 (S.D.N.Y.), 196-97). This line of reasoning leaves a range of potential works that do not necessarily require skill but which are creative, unprotected. This could also have effects in the context of digital technology, including minimalist art that demonstrates uniqueness and certainly a range of future art forms. Under the “sweat of the brow” doctrine, copyright should apply to creations, regardless of their originality, because of the difficulty and the expense of time, money or effort in producing them. The court’s dismissal of this doctrine is a uniquely American point of view; several European jurisdictions, for example, specifically provide copyright protection under this criterion.
- 88 (1869) LR 4 QB 715.
- 89 L.R. 4 Q.B. at 722. It should be noted that the state of the law in the United States of America is not entirely settled. *Bridgeman* was decided in 1999 in the Southern District for New York and is not necessarily followed by in other Circuits or in New York itself. In 2000, *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F.Supp.2d 301 (S.D.N.Y. 2000) held that product photographs of mirrored picture frames were entitled to copyright protection noting that “[t]here is no uniform test to determine the copyright ability of photographs.” *Id.*, at 309-310. Arguably, the definition of what constitutes a photograph has changed with digital technology.
- 90 A wide range of interested parties attended *Who Owns This Image? Art Access, and the Public Domain after Bridgeman v. Corel*, Public Panel Discussion cosponsored by the Art Law Committee of the New York City Bar Association, the College Art Association, ARTstor, Creative Commons and Art Resource, April 29, 2008.
- 91 The decision’s repercussions for museums, libraries and archives in the United States of America could be significant because some institutions have the potential to, or currently do, receive money for the reproductions of their slides or transparencies of public domain works. For example, the Library of Congress, with its partnership with Flickr, earns revenue from such activities. Also, the Frick Collection in New York has digitized its collection and made it available for viewing on the Internet. The majority of artworks in its collection are in the public domain. Yet, and running contrary to the *Bridgeman* decision, the Frick claims copyright ownership of all the images and text on the website. (See The Frick Collection and Frick Art Reference Library, available at <http://www.frick.org/copyright/index.htm> (last accessed March 10, 2010). There has been some academic discussions about suing such institutions for copyright misuse.)

- 92 Second Edition (London: Sweet & Maxwell, 2003).
- 93 IPR Case Study Seminar: Bridgeman vs. Corel: *Copyrighted Creativity or Commerce?* May 3, 2007.
- 94 France, Court of Appeals of Nîmes, judgment of July 15, 1997, Jurisdata 030467.
- 95 Tribunal de Grande Instance of Paris, judgment of May 28, 1997, RIDA 1/1998, 329.
- 96 Trib. Bologna, decision of December 23, 1992, 1993 II Diritto di Autore 489.
- 97 See *Blau Guggenheim v. British Broadcasting Corporation BBC* (BGE 130 (2004) III S. 714-720).
- 98 Digital rights management is used here as a generic term that could include watermarking or other technologically-controlled barriers to free access.
- 99 See *Who Owns This Image?*, *op. cit.* note 90.
- 100 Whether the compilation is of “unoriginal facts” does not matter for its protection, but only whether is arrangement or selection (of whatever material) is original.
- 101 *Sweat of the brow* is a term used, sometimes as the name of a doctrine, for the idea that copyright should be protected to creations, regardless of their originality, because of the difficulty in producing something, such as time, money or effort.
- 102 For an updated account of the Database Directive, see the Database Right File, maintained by the Institute for Information Law, Amsterdam, available at [www.ivir.nl/files/database](http://www.ivir.nl/files/database) (last accessed March 10, 2010).
- 103 J. Anderson and G. Koch (2004), ‘The Politics of Context: Issues for Law, Researchers and the Compilation of Databases’ In *Researchers, Communities, Institutions, Sound Recordings* edited by L Barwick, A Marett and J Simpson. Sydney: University of Sydney.
- 104 J. Hollowell and G. Nicholas (editors). “Decoding Implications of the Genographic Project for Cultural Heritage Studies,” Special Section, *International Journal of Cultural Property*, Vol. 16, No. 2, 2009.
- 105 Belgian Supreme Court, Hof van Cassatie/Cour de Cassation, 11 May 2001.
- 106 See WIPO, Consolidated Analysis, *op. cit.* note 30.
- 107 The Protection of Traditional Knowledge: Table of Written Comments on Revised Objectives and Principles, May 2007, WIPO Document WIPO/GRTKF/IC/11/5(b), Appendix at 4.27.
- 108 212 F.3d 1210 (11th Cir. 2000).
- 109 See “Carpets case”, *op. cit.* note 81.
- 110 IPA intervention at the Sixth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; Geneva, 16 March 2004.
- 111 See K.C. Ying, *Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?* *Journal of Malaysian and Comparative Law*, 2005, Vol. 32, No. 1, at 31.
- 112 See Berne Convention, Articles 2.1 and 2.2.
- 113 See, e.g., Copyright Act of the United States of America, Section 101 at “fixed” and Copyright Act of South Africa, Section 2(2).
- 114 See, e.g., Switzerland Federal Law on Copyright and Neighboring Rights of October 9, 1992, Art. 2(1). “A work shall enjoy copyright protection as soon as it is created, whether or not it has been fixed on a physical medium.” *Id.*
- 115 See C. Oguamanam, “International Law and Indigenous Knowledge: Intellectual Property Rights, Plant Biodiversity, and Traditional Medicine,” University of Toronto Press, (2006), p. 181
- 116 *Ibid.*
- 117 See *Christoffer v. Poseidon Film Distributors Ltd* [2000] E.C.D.R. 487 (UK: High Court).
- 118 C. Farley, *Protecting Folklore: Is Intellectual Property the Answer?* *Connecticut Law Review*, Vol. 30, 1997.
- 119 See, for example, Draft Provisions, Article 5.
- 120 See Berne Convention, *op. cit.* note 31, article 18(1).
- 121 The copyright duration may vary from country to country, thereby providing several dates of entry into the public domain. See <http://www.ibiblio.org/wm/paint/auth/kleo> (last accessed March 10, 2010).
- 122 See, e.g., the Neue Pinakothek, Munich, available at [http://www.pinakothek.de/neuepinakothek/sammlung/rundgang/rundgang\\_en.php](http://www.pinakothek.de/neuepinakothek/sammlung/rundgang/rundgang_en.php) (last accessed March 10, 2010). “The Neue Pinakothek always exhibits approximately 450 paintings chosen from its collection of more than 4,500 paintings and 300 sculptures. You can see 100 highlights of the paintings currently on exhibit in our Internet website.”
- 123 See, e.g., the Museum of Modern Art, New York, [http://www.moma.org/collection/browse\\_results.php?criteria=O%3AYM%3AG%3A1990%7CG%3AH0%3AE%3A1&page\\_number=22&template\\_id=1&sort\\_order=1](http://www.moma.org/collection/browse_results.php?criteria=O%3AYM%3AG%3A1990%7CG%3AH0%3AE%3A1&page_number=22&template_id=1&sort_order=1) (last accessed March 10, 2010). For example, next to Luc Tuymans’s *Lumumba*, 2000, the associated graphic reads: Image not available.

- 124 The source of ambiguity of whether a TCE may or may not be in the public domain, as it is construed under IP law, is related to the tension between national IP laws and indigenous and traditional customary law.
- 125 See, e.g., *Yumbulul v. Reserve Bank of Australia* (1991) 21 IPR 481. The judge noted that the sacred character of the work copied and the criticism the artist received in his community were indicative of the poor fit that Australia's copyright law provided for TCEs in the public domain.
- 126 See for example, WIPO Document WIPO/GRTKF/IC/3/11 "Expressions of Folklore—Document submitted by the European Community and its Member States": "There is a point where a line must be drawn between the public domain and protected intellectual property. [...] the realm of intellectual property protection should not be extended to a point where it becomes diffuse and legal certainty diluted." One should distinguish, however, the notion of a community public domain from that of a general public domain, where non-community members can have access to TCEs.
- 127 See WIPO, Consolidated Analysis, *op. cit.* note 30.
- 128 See [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last accessed April 14, 2010)
- 129 See <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm> (last accessed March 18, 2010).
- 130 Intervention of the European Community, WIPO/GRTKF/IC/3/11.
- 131 M. Rose, "Authors and Owners: The Invention of Copyright", Harvard University Press (1995); M. Woodmansee and P. Jaszi, "The Construction of Authorship: Textual Appropriation in Law and Literature", Duke University Press (1994).
- 132 See the collection in the Smithsonian Global Sound that has unknown authors: <http://www.smithsonianglobalsound.org/> (last accessed March 10, 2010).
- 133 Copyright Act of Canada, Art. 77
- 134 Report on Digital Preservation, Orphan Works, and Out-of-Print Works, 2010: Digital Libraries High Level Expert Group – Copyright Subgroup, 2007.
- 135 As of May 2008, the only enacted orphan works legislation are in Canada, the United Kingdom, Fiji, India, Japan and South Korea and there are no identifiable cases or disputes that deal directly with TCEs. All of these legislations provide for case-by-base analyses of a proposed compulsory licensing of an orphan work. Since 1990, the Copyright Board of Canada has issued 242 decisions regarding unlocatable copyright owners; see <http://www.cb-cda.gc.ca/unlocatable-introuvables/index-e.html> (last accessed April 14, 2010) for a list of applicants and decisions.
- 136 For example, this is proposed in Emily Hudson and Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitisation*, The University of Melbourne, Melbourne Law School, February 2006, at 100.
- 137 See Annex II for some national terms of protection.
- 138 Ley Federal del Derecho de Autor, Nueva Ley publicada en el Diario Oficial de la Federacion el 24 de diciembre de 1996; Texto Vigente, Ultima reforma publicada DOF 23-07-2003.
- 139 J.M. Barrie, the creator of Peter Pan, bequeathed the copyright and other intellectual property rights of Peter Pan to a London hospital. Under the current harmonized EU legislation, the copyright just expired on December 31, 2007. Thanks to special legislation, however (Copyright, Designs and Patents Act 1988 (UK), § 301), small sums of royalties will continue to accrue in Great Britain.
- 140 M. Rimmer (2003), 'Albert Namatjira: copyright estates and traditional knowledge' Australian Library and Information Association June 2003, 1-2.
- 141 Canada's Copyright Act, for example, has a specific provision for an exhibition right for copyright holders. See Article 3(1)(g) of the Copyright Act. Moral rights, discussed below, are stronger in some jurisdictions than others. The menu of benefits conferred to an artist through moral rights could include the manner in which his or her artwork is displayed.
- 142 In Ireland, literary works receive "life + fifty" while films receive "life + seventy."
- 143 Most European Union countries made the extensions retroactive, temporarily bringing some works back into copyright.
- 144 In many jurisdictions, there are provisions for works of joint authorship. In the United Kingdom, for example, in the case of works made through a collaboration of two or more authors, where the contribution of each author is not distinct from that of the other authors, then the work is one of joint authorship and all of the authors jointly own the copyright. This means that, where the finished work does not exhibit distinct works from separate authors, but is seen or experienced as a whole piece, then a work of joint authorship would have been made. Some examples are the works of Gilbert and George or Lennon and McCartney.
- 145 In some jurisdictions, where a work was created by an employee, the employer will generally own the copyright unless otherwise provided for in a contract.

- 146 See Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options, WIPO/GRTKF/IC/6/3. See also The Protection of  
Traditional Cultural Expressions: Draft Gap Analysis, WIPO/GRTKF/IC/13/4(b) Rev.
- 147 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eleventh Session,  
July 3 to 12, 2007, WIPO Document WIPO/GRTKF/IC/11/15, para. 209.
- 148 See Annex II (List of copyright laws).
- 149 Through the right to withdraw or retract, the author can prevent further reproduction or distribution of his work. See, for example,  
French Intellectual Property Code, Art. L121-1.
- 150 See, for example of implementation of such rights, Canadian Copyright Act, S.C. 1997. c. 24, § 14.1.
- 151 United States of America Copyright Act, Section 106 A.
- 152 Bernard Buffet, a French artist, was asked to decorate a refrigerator to be put up for auction at a charity event. His composition,  
composed of six panels, was purchased and later dissembled into six separate works of art. Buffet brought action and won, based on  
his moral rights.
- 153 David Smith, a modernist sculptor, created a composition entitled 17 h's, made from welded steel and covered with six coats of  
cadmium red paint. The dealer who owned the sculpture was approached by a collector who liked the composition but not the color.  
Without the artist's knowledge or consent, the dealer sent the sculpture to a foundry, had it stripped, and then consummated the sale.  
See Patricia Failing, *Artists Moral Rights in the United States before VARA/1990: An Introduction*. The Committee on Intellectual  
Property of the College Art Association, Session Paper, February 2009, citing David Smith's letters published in ARTS (June 1960).
- 154 In 1981, artist Richard Serra installed his sculpture *Tilted Arc* in Federal Plaza in New York City; the artist created it specifically for that  
site. It had been commissioned by the Arts-in-Architecture Program of the U.S. General Services Administration. *Tilted Arc* is a curving  
wall of raw steel, 120 feet long and 12 feet high, which carved the space of the Federal Plaza in half. On March 15, 1989, during the  
night, federal workers cut *Tilted Arc* into three pieces, removed it from Federal Plaza, and carted it off to a scrap-metal yard. The artist  
brought suit but U.S. laws were, at least at the time, inadequate to protect Serra's work. See Richard Serra, *Writings and Interviews*, at  
193 (University of Chicago Press, 1994).
- 155 However the concept of group ownership of moral rights may raise additional challenges.
- 156 See WIPO, Consolidated Analysis, *op. cit.* note 30, p.31
- 157 Laws of the Federation of Nigeria, 1990, Copyright Act, Ch. 68, Section 28(3).
- 158 Adebambo Adewopo, *Protection and Administration of Folklore in Nigeria*, SCRIPT-ed, Vol. 3, Issue 1, March 2006. This reflects the  
problem of equating political boundaries and entities with cultural communities and owners of IP. Knowledge and practice linked to a  
TCE may be limited to members of a particular society, or they may be shared in broad general form or in particular forms by societies  
who otherwise consider themselves distinct. Indigenous and traditional communities often span more than one political polity and many  
are not interested in having their state's government claim ownership over their TCEs.
- 159 See Indigenous Artists, The Australian Copyright Council, available from <http://www.copyright.org.au/information/cit001/wp0005>  
(last accessed April 14, 2010)
- 160 See Cal. Civ. Code Section 986 (2002).
- 161 See M. Rimmer, *A Right of Resale? Indigenous Art under the Hammer*, ABC Australia, July 27, 2007.
- 162 Directive on Resale Right for the Benefit of the Author of an Original Work of Art, 2001.
- 163 Moreover, Recital 6 of the Preamble states that "The Berne Convention for the Protection of Literary and Artistic Works provides that the  
resale right is available only if legislation in the country to which the author belongs so permits. The right is therefore optional and  
subject to the rule of reciprocity. It follows from the case-law of the Court of Justice of the European Communities on the application of  
the principle of non-discrimination laid down in Article 12 of the Treaty, as shown in the judgment of 20 October 1993 in Joined Cases  
C-92/92 and C-326/92 Phil Collins and Others (4), that domestic provisions containing reciprocity clauses cannot be relied upon in  
order to deny nationals of other Member States rights conferred on national authors. The application of such clauses in the Community  
context runs counter to the principle of equal treatment resulting from the prohibition of any discrimination on grounds of nationality."
- 164 J. MacDonald, *Aboriginal Art Dealers Fight Back*, The Art Newspaper, Issue 184, September 10, 2007.
- 165 Australian Art Market Report, Submission to the Senate Enquiry into the Indigenous Visual Arts Sector, Spring 2005 and Autumn 2006,  
available at [http://www.aph.gov.au/SENATE/COMMITTEE/ecita\\_ctte/Indigenous\\_arts/submissions/sub43.pdf](http://www.aph.gov.au/SENATE/COMMITTEE/ecita_ctte/Indigenous_arts/submissions/sub43.pdf)  
(last accessed March 18, 2010).

- 166 See <http://www.christies.com/departments/african-and-oceanic-art/> (last accessed March 10, 2010)
- 167 American Indian Art Overview, Sotheby's, available at [http://www.sothebys.com/app/live/dept/DeptGlobal.jsp?dept\\_id=5](http://www.sothebys.com/app/live/dept/DeptGlobal.jsp?dept_id=5) (last accessed March 10, 2010).
- 168 Fred Myers, PAINTING CULTURE: THE MAKING OF AN ABORIGINAL HIGH ART, Duke University Press: Durham, 2002. See, also The Australian Copyright Council, Bulletin 69, *The Art Resale Royalty*, available at [www.copyright.org.au/pdf/acc/book\\_tocs/b069v01.pdf](http://www.copyright.org.au/pdf/acc/book_tocs/b069v01.pdf). (last accessed March 18, 2010).
- 169 See Resale royalty rights for visual artists, Department of the Environment, Water, Heritage and the Arts, [http://www.arts.gov.au/artists/resale\\_royalty](http://www.arts.gov.au/artists/resale_royalty) (last accessed March 10, 2010).
- 170 Section 107 of the U.S. Copyright Act is the first attempt in American law to codify common law decisions which incorporated the fair use doctrine.
- 171 Factors listed in § 107 include the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work. It is understood that both the list of potentially fair uses and the factors to be considered in determining fair uses are illustrative, not exhaustive and that § 107 is designed to offer guidance rather than formulate exact rules.
- 172 960 US.2d 301 (2d Cir. 1992).
- 173 The applicability of this case is now arguable, however, given a more recent *Koons* case in which the artist prevailed on a fair use defense. See *Blanch v. Koons*, 467 F.3d 244 (2006).
- 174 United Kingdom Copyright, Designs and Patents Act, 1988.  
s29.-(1) Fair dealing with a literary, dramatic, musical work. . . for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided it is accompanied by a sufficient acknowledgement . . .  
s30.-(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.
- 175 Swaziland, Copyright Bill of 2004, Art. 9.
- 176 Directive 2001/29/EC.
- 177 There is only one exception that is mandatory for EU member states to implement into their own national legislation: Article 5 on Exceptions and limitations, concerning temporary acts of reproduction that are part of a technological process. This provision states that: "1. Temporary acts of reproduction [...], which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or; (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."
- 178 Law No. 92-597 of July 1, 1992, on the Intellectual Property Code, as last amended by Law No. 97-283 of March 27, 1997. Art. L 122-5. Once a work has been published, the author cannot prevent:
1. Private family performances.
  2. Copies for the private and personal use of the copier. This provision does not apply to works of art, computer programs (where a single safeguard copy is allowed, Art. L122-6-1-II) and databases.
  3. In cases where the name of the author and the source are clearly indicated,
    - a) Analyses and short citations justified by the critical, polemical, scientific or pedagogical nature of the work.
    - b) Press reviews.
    - c) Diffusion of public speeches as current news.
    - d) Reproductions of works of art in catalogues for auctions in France (subject to regulatory restrictions).
  4. Parody, pastiche and caricature, "taking into account the usage of the genre".
  5. Acts necessary to access a database within the limits of the agreed use.
- 179 Australia Copyright Act of 1968, Part 3, Division 3.
- 180 Copyright Amendment Act of 2006 (NO. 158, 2006).
- 181 South Africa Copyright Act, Section 12 (1).
- 182 *Sacred Dance Essay Prompts Tribal Banishment*, CNN.com, Feb. 6, 2004.



See The American Museum of Natural History, <http://anthro.amnh.org/anthro.html> (last accessed March 10, 2010). See also Skrydstrup, *supra* note 54, at 65-66.

*Id.*, at "Archives," Sections 2 and 3.

*Id.*, at "Photography," Section 1.

*Exploring the Permanent Collections*, Musée du Quai Branly, available at <http://www.quaibranly.fr/en/collections/permanent-collections/index.html> (last accessed March 10, 2010).

A. Riding, *Paris Opens a Museum for Non-Western Art*. The International Herald Tribune, June 21, 2006. "[S]hould objects that were not created as art be presented as art, isolated from their ethnographic context?" *Id.*

Legal Notes, Musée du Quai Branly, Utilisation Autorisée (authorized use), citing the Code de la propriété intellectuelle, Article L.122-5. Decisions within an indigenous group or traditional community about what limitations should be put on the use of a TCE may vary by generation, by who is in power, by who has been paid, etc.

See Skrydstrup, *supra* note 54.

Moreover, in most traditional cultures, a tangible TCE is a version of a particular chain of expressions, which are all typologically and functionally similar. The issue of "reproduction" arises when, in a cultural institution, the TCE is literally reproduced. This copy is merely a reproduction of one sample of the entire chain. In such a case, as far as copyright law is concerned, the author may be identified. However such identification would not be correct from the viewpoint of indigenous and traditional communities.

See, e.g., United States Department of Labor Bureau of Labor Statistics, Archivists, Curators and Museum Technicians, available at <http://www.bls.gov/oco/ocos065.htm> (last accessed March 10, 2010).

See, e.g., S. Vaidhyathan, COPYRIGHTS AND COPYWRONGS, 152. New York University Press, 2001. See also WIPO, Intellectual Property on the Internet: A Survey of Issues, Dec. 2002, at 33, WIPO Document WIPO/INT/02, available at [http://www.wipo.int/copyright/en/ecommerce/ip\\_survey/](http://www.wipo.int/copyright/en/ecommerce/ip_survey/) (last accessed April 14, 2010).

See, conversely, a case deciding that art restoration requiring a particularly sensitive and complex activity should reward the restorer with copyright protection. (Trib. Bologna, decision of December 23, 1992, 1993 Il Diritto di Autore 489, note 98 *supra*)

L. Kruth and H. Kruth, *The Question of Copyrighting Art Restorations*, WAAC Newsletter, Vol. 3, No. 3, Sept. 1981, 1-2.

Reid Mandel, *Copyrighting Art Restorations*, Bulletin, Copyright Society of the U.S.A. Vol. 28, No. 3, Feb. 1981.

The statutory exceptions for libraries primarily address such issues as reproduction of copyrighted works for purposes of private research and study, preservation and replacement of materials, and document supply and interlibrary lending. Some countries have statutes on the "making available" of copyrighted works. For an overview, see *Study on Copyright Limitations and Exceptions for Libraries and Archives*, SCCR/17/2, available online at: [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf) (last accessed April 14, 2010). However, in most current copyright law a useful mechanism that regulates or supports such an important activity is yet to be developed. (G. Pessach, *Museums, Digitization and Copyright Law – Taking Stock and Looking Ahead*, Journal of International Media and Entertainment Law, 2007.)

Section 30.1.

17 U.S.C. §108 (Limitations on exclusive rights: Reproduction by libraries and archives). The Digital Millennium Copyright Act (DMCA) makes more specifications in this vein, allowing up to three preservation copies in digital or analog format when the institution already has an original copy. The copy is solely for preservation, security or deposit within the institution. Generally, the nature and purpose of digital cultural preservation is a public benefit-oriented activity.

*Study on Copyright Limitations and Exceptions for Libraries and Archives*, SCCR/17/2

See Skrydstrup, *supra* note 54 at 76.

Intervention by the Delegation of the United States of America to the WIPO IGC, Ninth Session, April 2006. WIPO Document WIPO/GRTKF/IC/9/14.

For example, Section 202 of the United States of America Copyright Act states that: "Ownership of a copyright... is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object... does not of itself convey any rights in the copyrighted work embodied in the object..."

D. Vaver, *Copyright Law*, (Irwin Law, Toronto, 2000)

In the United Kingdom duration of Crown copyright varies depending on whether material is published or unpublished: published works are protected for 50 years from the date of publication while unpublished works are covered for 125 years from the date of creation.

Certain works are protected under *Letters Patent* – applicable to a small class of materials where the Crown claims the right to control reproduction outside normal law such as the King James Bible and the Book of Common Prayer. These kinds of works have perpetual copyright protection.

- 206 In Australia, the Government owns copyright in any work, film or sound recording made by or under the direction or control of the Government, and any work first published by or under its direction. (Australia Copyright Act of 1968, Part VII.) A current recommendation by the Australian Copyright Law Review Committee is that the Crown relinquishes its unique position of gaining copyright over material simply because it publishes first. (Copyright Law Review Committee, Crown Copyright Report, Jan. 2005, [http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~6+APRIL+full+version+crown+copyright.pdf/\\$file/6+APRIL+full+version+crown+copyright.pdf](http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~6+APRIL+full+version+crown+copyright.pdf/$file/6+APRIL+full+version+crown+copyright.pdf)) (last accessed March 18, 2010).
- 207 In New Zealand, the Crown is the first owner of any copyright subsisting in any work created by a person who is employed or engaged by the Crown and covers works of the Queen, Ministers of the Crown, Offices of Parliament and other government departments. A term of 100 years applies to Crown copyright. (New Zealand Copyright Act of 1994, §§ 2(1), 26, 27.)
- 208 Works produced by employees of the United States of America government, in the performance of their official duties, are not eligible for copyright protection. U.S. Copyright Act, §§ 101, 105. § 105 states that “Copyright protection... is not available for any work of the United States of America Government, but the United States of America Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest or otherwise.” However, the AFC has many audio recordings of traditional musicians and singers that were collected by government workers for the Federal Writers Project in the 1930s. The fact that these recordings were made by government workers does not negate the IP Rights of the artists. So, at the AFC, any use of these recordings would still require the user to obtain permissions from the artists or the artists’ heirs. However, any original written work done by government employees would be “work for hire” and not covered by copyright (for the government employee). For example, an essay written about the field collecting trip would not be copyrighted.
- 209 Official works, such as legal regulations, decisions, public charters and collections of legal regulations, are not afforded copyright protection. Czech Republic Copyright Act, Art. 3(a).
- 210 Laws, ordinances, official decrees, notices, decisions, and official grounds of decisions shall not enjoy copyright protection. German Law on Copyright and Neighboring Rights, Art. 5(1).
- 211 No copyright subsists in laws, decrees, or ordinances issued by public authorities. The Netherlands Copyright Act of 1912, Art. 11.
- 212 See The Museum of Australian Currency Notes. The bottom note “depicts an Aboriginal youth, a Morning Star Pole and other designs includ(ed) from Aboriginal artworks commissioned by the Bank,” and is copyrighted to the Reserve Bank of Australia, available at [http://www.rba.gov.au/Museum/Displays/1988\\_onwards\\_polymer\\_currency\\_notes/first\\_polymer.html](http://www.rba.gov.au/Museum/Displays/1988_onwards_polymer_currency_notes/first_polymer.html) (last accessed March 10, 2010).
- 213 However, moral rights are usually inalienable or non-transferable. See for instance: France Intellectual Property Code, Art. L. 121-1. They may however sometimes be waived, although a mere assignment or license of copyright in a work does not, in and of itself, amount to a waiver of moral rights in the work.
- 214 See Creative Commons, About Creative Commons, available at <http://creativecommons.org/about/> (last accessed March 10, 2010).
- 215 See K. Bowrey and J. Anderson, ‘The Politics of Global Information Sharing: Whose Cultural Agendas are Being Advanced?’, *Social & Legal Studies*, Vol. 18, No. 4, 479-504 (2009)
- 216 See <http://www.wipo.int/treaties/en/ip/romel/> (last accessed April 14, 2010)
- 217 As of March 10, 2010 the WPPT has 86 parties. See [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=20](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20) (last accessed April 14, 2010)
- 218 For example, the WPPT requires States parties to implement in their legislation measures to prevent the circumvention of technological protection measures (TPMs), such as encryption. It also requires them to prohibit the deliberate alteration or deletion of electronic digital rights management (DRM) information.
- 219 Section 3, Copyright, Designs and Patents Act, 1988.
- 220 See <http://alutiqmuseum.org/> (last accessed April 14, 2010)
- 221 See The Sudanese Traditional Music Archive, available at [http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/sudanese\\_archives.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/sudanese_archives.pdf) (last accessed April 14, 2010)
- 222 IMLS Announces Results of Study on the Internet’s Impact on Museums and Libraries, IMLS Announcements, March 6, 2008.



- 223 El Greco (Domenikos Theotokopoulos) (1541 - 1614), Purification of the Temple, c.1600, oil on canvas, 16 1/2 in. x 20 5/8 in. (41.91 cm x 52.39 cm), Henry Clay Frick Bequest, Accession number: 1909.1.66.
- 224 See <http://www.frick.org/copyright/index.htm> (last accessed March 10, 2010).
- 225 Sts. Peter and Paul, Greco, El., Oil on canvas. 121.5x105 cm, Spain. Between 1587 and 1592. Source of Entry: gift of P. P. Durnovo, St Petersburg. 1911.
- 226 See [http://www.hermitagemuseum.org/html\\_En/00/hm0\\_7.html](http://www.hermitagemuseum.org/html_En/00/hm0_7.html) (last accessed March 10, 2010).
- 227 Digital watermarking is a technique that allows the addition of hidden copyright notices or other verification messages to digital audio, video, or image signals and documents, with the aim to deter unauthorized uses.
- 228 Painting, 229.3 X 285.5 cm, Col·lecció MACBA. Fundació Museu d'Art Contemporani de Barcelona, available at [http://www.macba.es/controller.php?p\\_action=show\\_page&pagina\\_id=29&inst\\_id=18132](http://www.macba.es/controller.php?p_action=show_page&pagina_id=29&inst_id=18132) (last accessed March 10, 2010).
- 229 See, e.g., The Loti and Victor Smorgon Collection of Australian Art, available at [http://www.mca.com.au/default.asp?page\\_id=16&content\\_id=614](http://www.mca.com.au/default.asp?page_id=16&content_id=614) (last accessed March 10, 2010).
- 230 See <http://www.mocca.ca/> (last accessed March 25, 2010).
- 231 See B. Milhazes, Succulent Eggplants 2006. Synthetic polymer paint on canvas, 74 3/4 x 96 1/2" Gift of Agnes Gund and Nina and Gordon Bunshaft Bequest Fund.
- 232 See <http://www.moma.org/research/permissions/index.html> (last accessed March 19, 2010).
- 233 See <http://www.mun.ca/folklore/leach> (last accessed March 19, 2010) and Beverly Diamond, "Reconnecting: University Archives and the Communities of Newfoundland" in Anna Hoefnagels and Gordon E. Smith, eds. *Folk Music, Traditional Music, Ethnomusicology. Canadian Perspectives, Past and Present*, Newcastle upon Tyne: Cambridge Scholars Publishing, 3-12, 2007.
- 234 M.L. Anderson, *Who Will Own Art Museum's IP Content?* The Art Newspaper, Nov. 1, 2005.
- 235 See <http://www.nau.edu/library/speccoll/speccollections.html> (last accessed March 10, 2010)
- 236 See [http://www.loc.gov/rr/print/flickr\\_pilot.html](http://www.loc.gov/rr/print/flickr_pilot.html) (last accessed March 10, 2010).
- 237 Folk-Songs of America: The Robert Winslow Gordon Collection, 1922-1932, available at <http://www.loc.gov/folklife/Gordon/index.html> (last accessed March 10, 2010).
- 238 Library of Congress Legal Notices, <http://www.loc.gov/homepage/legal.html> (last accessed March 10, 2010).
- 239 Musée du Quai Branly, Credits, <http://www.quaibranly.fr/en/a-propos/credits/index.html> (last accessed March 10, 2010)
- 240 See S. Tanner and M. Deegan, *Exploring Charging Models for Digital Cultural Heritage*, A HEDS Report on behalf of the Andrew W. Mellon Foundation, June 2002
- 241 A report similar to Tanner and Deegan, *id.*, was undertaken in the United States of America. This study found that 99% of surveyed institutions charge less for educational use than for commercial use. See *A Mellon Foundation Study: Reproduction Charging Models and Rights Policy for Digital Images in American Art Museums*, [http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum\\_SimonTanner.pdf](http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum_SimonTanner.pdf) (last accessed April 14, 2010)
- 242 While an exhaustive list of collecting societies is beyond the scope of this publication, a few major organizations that are relevant for cultural professionals include: (1) The Design and Artists Copyright Society [DACS]: The United Kingdom's copyright and collecting society for artists and visual creators; (2) Bild-Kunst, an organization providing copyright protection for artists, photographers and graphic designers in Germany; (3) Canadian Artists Representation Copyright Collective [CARCC], a copyright collective licensing and administering copyright for visual and media artists in Canada; (4) Artists Rights Society [ARS], a copyright, licensing and monitoring organization for visual artists in the United States of America; (5) ASCAP/BMI, a licensing organization for music in the United States of America; (6) Viscopy, collecting agency for artists in Australia; (7) the International Confederation of Societies of Authors and Composers (CISAC), an association of collecting societies.
- 243 See e.g., Guggenheim Museum, The Collection, Credits, available at <http://www.guggenheimcollection.org/site/credits.html> (last accessed on March 10, 2010).
- 244 The Museum of Modern Art, for example, has appointed Art Resource and Scala Group S.p.A as its representative for commercial reproduction of its images. See MoMA, About this Site, available at <http://www.guggenheimcollection.org/site/credits.html> (last accessed on March 10, 2010).
- 245 See [http://www.ifrro.org/upload/images/TK\\_Statement\\_2008.pdf](http://www.ifrro.org/upload/images/TK_Statement_2008.pdf) (last accessed March 19, 2010).

- 246 See <http://www.samikopijja.org/web/index.php?sladja=4&giella1=eng> (last accessed March 10, 2010) and John T. Solbakk, Sámi traditional knowledge as valuable creative work, available online at <http://www.samikopijja.org/web/index.php?sladja=7&giella1=eng> (last accessed March 10, 2010).
- 247 Terri Janke, *Beyond guarding ground- the case for a National Indigenous Cultural Authority*, available online at [http://www.australiacouncil.gov.au/research/aboriginal\\_and\\_torres\\_strait\\_islander\\_arts/reports\\_and\\_publications/beyondguardingground](http://www.australiacouncil.gov.au/research/aboriginal_and_torres_strait_islander_arts/reports_and_publications/beyondguardingground) (last accessed March 10, 2010).
- 248 See <http://www.moma.org/visit/calendar/exhibitions/106> (last accessed March 25, 2010).
- 249 "The trademarks, trade names, logos and service marks ('Trademarks') displayed on this Web site, including 'SFMOMA,' are Trademarks of SFMOMA." [http://www.sfmoma.org/pages/terms\\_of\\_use](http://www.sfmoma.org/pages/terms_of_use) (last accessed April 14, 2010)
- 250 See <http://www.thelibraryshop.org/> (last accessed March 11, 2010).
- 251 See, e.g., the Frick Collection, Winter Ball 2006, available at <http://www.shopfrick.org/support/yfwwinterball2006.htm> (last accessed March 11, 2010). See also the Morgan Library Young Associates webpage: [http://www.morganlibrary.org/membership/member2.asp?intProdID=12&strCatalog\\_NAME=Fellows&strSubCatalog\\_NAME=&strSubCatalogID=&intCatalogID=10002&CurCatalogID=](http://www.morganlibrary.org/membership/member2.asp?intProdID=12&strCatalog_NAME=Fellows&strSubCatalog_NAME=&strSubCatalogID=&intCatalogID=10002&CurCatalogID=) (last accessed March 11, 2010).
- 252 At the Morgan Library in New York, for example, members of the young patron group who attended a winter gala received a designer compact, designer bottle of perfume, designer bottle of shampoo and a paperback version of a then-recent biography of Pierpont Morgan's life (1837-1913).
- 253 Picasso, [www.picasso.fr](http://www.picasso.fr) (last accessed March 11, 2010).
- 254 European Union First Chamber, Case C-361/04 P (Jan 12, 2006). It was argued that there was a risk of confusion with regard to the Picasso trademark which was licensed to the French car manufacturers PSA Peugeot-Citroën.
- 255 J. Author, *Use of Sacred Symbol Causes New Mexico Controversy*, CNN.com, quoting Zia Pueblo tribe elder Ysidro Pino.
- 256 P. Patton, *Trademark Battle Over Pueblo Sign*, The New York Times, Jan. 13, 2000.
- 257 Public Hearing on Official Insignia of Native American Tribes, Transcripts and Comments from 1999, available at <http://www.uspto.gov/web/offices/com/hearings/index.html#native> (last accessed March 11, 2010).
- 258 Ibid. Also reprinted in M. Brown, *WHO OWNS NATIVE CULTURE?* Harvard University Press: Harvard, 2004 at p.81.
- 259 See <http://www.samikopijja.org/web/index.php?sladja=7&giella1=eng> (last accessed March 11, 2010).
- 260 The International Trademark Association, Comments on the Revised Draft Provisions for the Protection of Traditional Cultural Expressions / Expressions of Folklore: Policy Objectives and Core Principles, July 31, 2006.
- 261 The Madrid System for the International Registration of Marks administered by the International Bureau of WIPO offers a trademark owner the possibility to have his trademark registered in several countries by simply filing one application directly with his own national or regional trademark office. For more information, see <http://www.wipo.int/madrid/en/> (last accessed April 14, 2010). At the European Union level, OHIM is the agency responsible for registering trade marks and designs that are valid in all 27 countries of the EU; see <http://oami.europa.eu/ows/rw/pages/index.en.do> (last accessed March 19, 2010).
- 262 Aveda Press Release, 4 November 2003. Available at <http://aveda.aveda.com/about/press/indigenous.asp> (last accessed March 11, 2010).
- 263 Aveda Press Release, May 22, 2007. "A Dialogue for the Future, Aveda and its Partners discuss the Opportunity and Challenges of Indigenous Entrepreneurship", available at <http://aveda.aveda.com/about/press/pdf/NR-AvedaUNConference07.pdf> (last accessed March 19, 2010).
- 264 In this sense, "geographical indication" encompasses the term "appellation of origin" as defined by the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1979 and as referred to in the Paris Convention. Another subject of IP protection is an "indication of source," which is also referred to in the Paris Convention, and which refers to any expression or sign used to indicate that a product or service originates in a country, region, or specific place. The difference, it follows, between "geographical indication" as used in the TRIPS Agreement and "appellation of origin" as used in the Paris Convention, on the one hand, and "indication of source," is that the former require a quality link between the product and its area of production, the latter not. The term "geographical indication" is often used to refer to both appellations of origin and indications of source. In order to take into account all existing forms of protection, this document uses the term "geographical indication" in its widest possible meaning.

In respect of geographical indications, States must, according to Article 22.2 of the TRIPS Agreement, provide legal means for “interested parties” to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good originates in a geographical area other than its true place of origin in a manner that misleads the public and any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention. Under Article 22.3, States may refuse or invalidate the registration of trademarks which contain or consist of a geographical indication with respect to goods not originating in the territory indicated, if such use of the indication would mislead the public.

Niello is a black metallic alloy of sulfur, copper, silver, and usually lead, used as an inlay on engraved metal. It can be used for filling in designs cut from metal, from Wikipedia, <http://en.wikipedia.org/wiki/Niello> (last accessed March 11, 2010).

These examples are taken from WIPO, Consolidated Analysis, *op. cit.* note 30.

This is the case of many institutions’ websites, *see* for example: [www.moma.org](http://www.moma.org), (last accessed March 12, 2010), [www.britishmuseum.org](http://www.britishmuseum.org), (last accessed March 12, 2010) and [www.hermitagemuseum.org](http://www.hermitagemuseum.org) (last accessed March 12, 2010).

For example, <http://www.banq.qc.ca/> (last accessed March 12, 2010) or <http://www.en.nationaalarchief.nl/> (last accessed March 12, 2010).

Tikanga.com, Services, <http://www.tikanga.com/services.html> (last accessed March 12, 2010).

This TLD is administered and managed by the Museum Domain Management Association (MuseDoma), a nonprofit organization, through an agreement with the Internet Corporation for Assigned Names and Numbers (ICANN), an organization dedicated to the technical management of the Domain Name System (DNS).

Welcome to .museum, available at <http://about.museum/> (last accessed March 12, 2010).

*See, e.g.*, J. Levine, *Time to Renew .coop, .museum, and .aero ICANN*, available at [http://www.circleid.com/posts/time\\_to\\_renew\\_coop\\_museum\\_and\\_aero\\_icann/](http://www.circleid.com/posts/time_to_renew_coop_museum_and_aero_icann/) (last accessed March 12, 2010).

*See Renewal Proposal for the dotMuseum Sponsorship Agreement*, MuseDoma, Nov. 16 2005, at 4, available at <http://www.icann.org/tlds/renewals/museum-renewal-proposal-16nov05.pdf> (last accessed March 19, 2010)

*Id.*, at 6.

More information on the WIPO Arbitration and Mediation Center’s UDRP services is available at: [www.wipo.int/amc/en/domains/gtld/](http://www.wipo.int/amc/en/domains/gtld/) (last accessed April 14, 2010)

One example in which the UDRP was used by a museum, is *San Francisco Museum of Modern Art v. Joshua S. Drapiewski*, WIPO Case No. D2000-1751. The defendant registered <sfmoma.com> (confusingly similar to the Museum’s trademark SFMOMA); the panel concluded that that the Museum’s request for the transfer of the respondent’s registered domain name be granted. Other examples include: *The Trustees of The British Museum, The British Museum Company Limited v. British Museum Resources, Limited*, WIPO Case No. D2007-0142, <britishmuseum.org>; *The Baltimore Museum of Art, Inc. v. Mo Domains*, WIPO Case No. D2005-0720, <baltimoremuseumofart.com>; *Museum of New Zealand Te Papa Tongarewa v. Greg Nicolas*, WIPO Case No. D2004-0288, <tepapa.com>; *Indivision Picasso v. Manuel Muñoz Fernandez [Hereisall]*, WIPO Case No. D2002-0496, <fundacionpicasso.com>, <museopicassomalaga.com>, <museopicassodemalaga.com>; and, *Van Gogh Museum Enterprises BV and Stichting Van Gogh Museum v. M. Ohannessian*, WIPO Case No. D2001-0879, <vangoghmuseum.com>.

WIPO Case No. D2005-0524.

*See, e.g.*, C. Karp, *Internationalized Domain Names in the Management of Cultural Heritage*, 27<sup>th</sup> Internationalization and Unicode Conference, Berlin, Germany, April 2005, available at <http://media.nic.museum/iuc27/karp.idn.pdf> (last accessed March 19, 2010).

*See e.g.*, <http://www.icann.org/en/topics/idn/> (last accessed March 12, 2010) and *Message from the [ICANN] CEO, 21 July 2009*, <http://www.icann.org/en/ceo/ceo-message-21jul09-en.htm>. (last accessed March 12, 2010).

*See, e.g.*, C. Karp, *Internationalized Domain Names in the Management of Cultural Heritage*, 27<sup>th</sup> Internationalization and Unicode Conference, Berlin, Germany, April 2005, available at <http://media.nic.museum/iuc27/karp.idn.pdf> (last accessed March 19, 2010).

*See* the United Nations New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

On benefits of ADR for resolving cultural heritage and traditional knowledge related disputes, *see*: Sarah Theurich, *Art and Cultural Heritage Dispute Resolution*, WIPO Magazine, Issue no. 4, 2009, [http://www.wipo.int/wipo\\_magazine/en/2009/04/article\\_0007.html](http://www.wipo.int/wipo_magazine/en/2009/04/article_0007.html). (last accessed March 19, 2010). *See also* Christian Wichard and Wend Wendland, *Mediation as an Option for Resolving Disputes between Indigenous/Traditional Communities and Industry concerning Traditional Knowledge*, in *Art and Cultural Heritage: Law, Policy, and Practice*, Barbara T. Hoffman (ed.), Cambridge University Press, 2006.

- 284 WIPO model ADR clauses and submission agreements are available in different languages at: <http://www.wipo.int/amc/en/clauses>  
(last accessed April 14, 2010)
- 285 More information on the WIPO Center is available at : [www.wipo.int/amc](http://www.wipo.int/amc) (last accessed April 14, 2010)
- 286 WIPO, Surveys of Existing Practices, Protocols and Policies, <http://www.wipo.int/tk/en/folklore/culturalheritage/surveys.html>  
(last accessed April 14, 2010)
- 287 WIPO, Case Studies, <http://www.wipo.int/tk/en/folklore/culturalheritage/casestudies.html> (last accessed April 14, 2010)
- 288 WIPO, Database of Existing Codes, Guidelines and Practices, [http://www.wipo.int/tk/en/folklore/creative\\_heritage/](http://www.wipo.int/tk/en/folklore/creative_heritage/) (last accessed April 14, 2010)
- 289 ICOM established its code of ethics in 2006. See: <http://icom.museum/ethics.html>. (last accessed March 12, 2010). Also, it has established a Cross Cultural Taskforce in 1992.
- 290 See <http://www.aiatsis.gov.au> (last accessed March 22, 2010)
- 291 See <http://www.aiatsis.gov.au/research/ethical.html> (last accessed March 25, 2010)
- 292 See <http://www.adck.nc/> (last accessed March 17, 2010).
- 293 See <http://www.pacificislandsmuseum.org/opening.html> (last accessed March 25, 2010).
- 294 *Ibid.*
- 295 See [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/pima\\_code\\_ethics.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/pima_code_ethics.pdf) (last accessed March 25, 2010).
- 296 *Ibid.*, p.1
- 297 *Ibid.*, p.2
- 298 <http://www1.aiatsis.gov.au/atsilirn/home/index.html> (last accessed March 17, 2010).
- 299 A Byrne, A Garwood, H Moorcroft & A Barnes Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services, ALIA Press, Canberra, 1995; [http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index6df0.html?option=com\\_content&task=blogcategory&id=0&Itemid=6](http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index6df0.html?option=com_content&task=blogcategory&id=0&Itemid=6) (last accessed March 22, 2010) and [http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index0c51.html?option=com\\_frontpage&Itemid=1](http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index0c51.html?option=com_frontpage&Itemid=1) (last accessed March 17, 2010)
- 300 Professor Martin Nakata, Director of Jumbunna Indigenous House of Learning at the University of Technology in Australia is pioneering this work. Nakata's work is directed at how libraries can both respond to indigenous needs, and also deliver important services to communities. This collaborative research, which is foundational to the development of the National Policy Framework, places central importance on developing new partnerships where information needs, within communities and within institutions, can be met.
- 301 See <http://www.nsla.org.au/publications/policies/2007/pdf/NSLA.Policy-20070129.National.Policy.Framework.for.Indigenous.Library.Services.pdf> (last accessed March 17, 2010).
- 302 See <http://epress.lib.uts.edu.au/dspace/bitstream/2100/809/1/Aug%2023%20Final%20Report.pdf> (last accessed March 17, 2010).
- 303 See <http://www.aiatsis.gov.au/research/education.html> (last accessed March 25, 2010).
- 304 See [http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/indexa3ae.html?option=com\\_content&task=view&id=16&Itemid=6&limit=1&limitstart=1](http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/indexa3ae.html?option=com_content&task=view&id=16&Itemid=6&limit=1&limitstart=1) (last accessed March 17, 2010).
- 305 See [http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index1d4b.html?option=com\\_content&task=view&id=52&Itemid=6](http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index1d4b.html?option=com_content&task=view&id=52&Itemid=6) (last accessed March 17, 2010).
- 306 See <http://www.niso.org/> (last accessed March 17, 2010).
- 307 See <http://www.ansi.org/> (last accessed March 17, 2010).
- 308 See <http://www.niso.org/about/> (last accessed March 17, 2010).
- 309 See [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/niso\\_framework.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/niso_framework.pdf), p.1 (last accessed April 14, 2010).
- 310 See [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/niso\\_framework.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/niso_framework.pdf), p.3-9 (last accessed April 14, 2010).
- 311 See [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/niso\\_framework.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/niso_framework.pdf), p.10 (last accessed April 14, 2010).
- 312 See [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/niso\\_framework.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/niso_framework.pdf), p.10 (last accessed April 14, 2010).
- 313 See <http://www.tepapa.govt.nz>, [http://www.wipo.int/tk/en/folklore/creative\\_heritage/museum/link0042.html](http://www.wipo.int/tk/en/folklore/creative_heritage/museum/link0042.html), [http://www.wipo.int/tk/en/folklore/creative\\_heritage/museum/link0039.html](http://www.wipo.int/tk/en/folklore/creative_heritage/museum/link0039.html) and <http://www.archives.govt.nz/> (all last accessed March 17, 2010).
- 314 J. Anderson and G. Koch, 'The Politics of Context: Issues for Law, Researchers and the Compilation of Databases' In *Researchers, Communities, Institutions, Sound Recordings* edited by L Barwick, A Marett and J Simpson. Sydney: University of Sydney, 2004.

- 315 See <http://www.paradisec.org.au/> (last accessed March 17, 2010).
- 316 This is just one example. Most ethnographic digital archives today have similar protocols and forms.
- 317 For more information about the British Library Archival Sound Recordings, see <http://sounds.bl.uk/TextPage.aspx?page=about> (last accessed March 17, 2010).
- 318 This statement was drafted in early 2009. See <http://sounds.bl.uk/TextPage.aspx?page=ethicalusage#permittedusage> (last accessed March 17, 2010).
- 319 For more information, see the WIPO Case Study "*Intellectual Property and Protection of Cultural Heritage: The case of the national museums of arts and civilizations in France*", [http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/rincon\\_report.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/rincon_report.pdf) (last accessed April 14, 2010).
- 320 See [http://www.quaibrany.fr/fileadmin/DS\\_conditions/Notice\\_d\\_clarative\\_des\\_auteurs\\_et\\_ayants\\_droit\\_non\\_identifi\\_s\\_des\\_oeuvres\\_diffus\\_es\\_01.pdf](http://www.quaibrany.fr/fileadmin/DS_conditions/Notice_d_clarative_des_auteurs_et_ayants_droit_non_identifi_s_des_oeuvres_diffus_es_01.pdf) (last accessed March 17, 2010).
- 321 See [http://www.quaibrany.fr/fileadmin/DS\\_conditions/Autorisation\\_de\\_reproduction\\_et\\_de\\_repr\\_sentation\\_de\\_photographies\\_01.pdf](http://www.quaibrany.fr/fileadmin/DS_conditions/Autorisation_de_reproduction_et_de_repr_sentation_de_photographies_01.pdf) (last accessed March 17, 2010).
- 322 For more information, see the WIPO Case Study "*Intellectual Property Management in an Ethnomusicology Archive: An Empirical View from India*", [http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/chaudhuri\\_report.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/culturalheritage/casestudies/chaudhuri_report.pdf) (last accessed April 14, 2010).
- 323 See <http://www.nau.edu/~hcipo-pl/> (last accessed March 25, 2010).
- 324 See <http://hopi.org/visiting-hopi/> (last accessed March 25, 2010).
- 325 See <http://www.nau.edu/~hcipo-p/intellectPropRights.html> (last accessed March 25, 2010).
- 326 See <http://www.nau.edu/~hcipo-p/ResProto.pdf> (last accessed March 25, 2010).
- 327 Information is available at <http://www.navajonationcouncil.org/> (last accessed March 17, 2010).
- 328 See <http://www.fijianaffairs.gov.fj/Culture%20&%20Heritage/index.htm> (last accessed March 17, 2010).
- 329 See [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/fiji\\_manual.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/fiji_manual.pdf) (last accessed April 14, 2010).
- 330 See [http://www.wipo.int/export/sites/www/tk/en/laws/pdf/spc\\_framework\\_2002.pdf](http://www.wipo.int/export/sites/www/tk/en/laws/pdf/spc_framework_2002.pdf) (last accessed March 25, 2010).
- 331 See [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/fiji\\_guideline.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/fiji_guideline.pdf) (last accessed April 14, 2010).
- 332 See for instance point e in Stage 1, point d in Stage 3, point c in phase II and point e in phase III of the Recommended Guideline.
- 333 See for instance point h in Stage 1, point b in Stage 3, and point b in phase II.
- 334 See <http://www.vanuatuculture.org> (last accessed March 17, 2010).
- 335 See Huffmann, K. (1999) "Communities and Fieldworkers: The Vanuatu Experience", OCEANIA, Vol. 70, No. 1, quoted in Mahina, K. (2004) "Museum of New Zealand Te Papa Tongarewa: The Case of the Intangible Heritage", ICME papers, <http://www.museumsnett.no/icme/icme2004/mahina.html> (last accessed March 17, 2010).
- 336 See [http://www.wipo.int/export/sites/www/tk/en/folklore/creative\\_heritage/docs/vanuatu\\_policy.pdf](http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/vanuatu_policy.pdf) (last accessed March 25, 2010).
- 337 "Kastom" is a pidgin word used to refer to traditional culture, including religion, economics, art and magic in the Pacific islands. In the policy, this is defined as indigenous knowledge and practices.
- 338 [http://www.wipo.int/tk/en/laws/pdf/vanuatu\\_copyright.pdf](http://www.wipo.int/tk/en/laws/pdf/vanuatu_copyright.pdf) See point 6 of the Research Policy.
- 339 See <http://www.vanuatuculture.org/documents/ResearchAgreement.doc> (last accessed March 17, 2010).
- 340 See [http://www.vanuatuculture.org/site-bm2/film-sound/20051122\\_pentecost\\_land\\_dive.shtml](http://www.vanuatuculture.org/site-bm2/film-sound/20051122_pentecost_land_dive.shtml) (last accessed April 14, 2010).
- 341 See paper by Mr. Ralph Regenvanu, Director, Vanuatu Cultural Centre at WIPO's 9<sup>th</sup> IGC session, <http://www.vanuatuculture.org/documents/RegenvanuIGC2006.DOC> (last accessed March 17, 2010).
- 342 This Section indicates the right to "acquire copyright" by the Vanuatu National Cultural Council, see WIPO Heritage Database for the Vanuatu National Cultural Council Act, 1988.
- 343 See, e.g., The International Federation of Reproduction Rights Organizations, Mission Statement, available at <http://www.ifrro.org/show.aspx?pageid=about/mission&culture=en>. (last accessed March 17, 2010).
- 344 See <http://www.aboriginalartists.com.au> (last accessed March 25, 2010). <http://www.aboriginalartists.com.au/>
- 345 H. Gaski, *Sámikopijja and Indigenous Rights in the Nordic Countries*, available at <http://www.ifrro.org/upload/documents/6Samikopijja%20and%20Indigenous%20Rights%20-%20Harald%20Gaski.doc>. (last accessed March 17, 2010). See also Agreement Kopinor-Sámikopijja, available at <http://www.samikopijja.org/web/index.php?sladja=14&giella1=eng> (last accessed March 17, 2010).



- 346 See <http://www.disa.ukzn.ac.za/> (last accessed March 25, 2010). See also  
 347 [http://www.wipo.int/tk/en/folklore/creative\\_heritage/docs/disa\\_license.pdf](http://www.wipo.int/tk/en/folklore/creative_heritage/docs/disa_license.pdf) (last accessed March 17, 2010).
- 348 Aluka is an online digital library focusing on materials about Africa. See <http://www.aluka.org/> (last accessed March 17, 2010).
- 349 See [http://www.wipo.int/tk/en/folklore/creative\\_heritage/docs/disa\\_license.pdf](http://www.wipo.int/tk/en/folklore/creative_heritage/docs/disa_license.pdf), p.1 (last accessed April 14, 2010)
- 350 See [http://www.wipo.int/tk/en/folklore/creative\\_heritage/docs/disa\\_license.pdf](http://www.wipo.int/tk/en/folklore/creative_heritage/docs/disa_license.pdf), p.1 (last accessed April 14, 2010)
- 351 See [http://www.wipo.int/tk/en/folklore/creative\\_heritage/docs/disa\\_license.pdf](http://www.wipo.int/tk/en/folklore/creative_heritage/docs/disa_license.pdf), p.1-2
- 352 For a thorough treatment of this example see *Minding Culture* *op. cit.* note 30, p. 86-99. Laura Aboriginal Dance and Cultural Festival, Arts Queensland, available at <http://www.arts.qld.gov.au/arts/ladcf.html>. (last accessed March 17, 2010).
- 353 See *Minding Culture*, *op. cit.* note 30, at 89. *The definitions are formal definitions used within IP discourse.*
- 354 For an analysis of the “three-step test,” see Martin Senftleben, Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law (Kluwer Law International, 2004).
- 355 Article 6*bis* states: (1) Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation; (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained; (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.
- 356 Article 3(3) defines “published works” as: “[...] works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.”
- 357 The British Library, About Us, Borrowing Items for Public Exhibition, available at  
<http://www.bl.uk/aboutus/stratpolprog/borrow/index.html#sixten> (last accessed March 17, 2010).
- 358 See, e.g., T. Crawford, Business and Legal Forms for Fine Artists, p. 63. Allworth Communications, Inc. (2005).
- 359 See [http://www.natgalscot.ac.uk/index.asp?centre=html/8-pubs/8\\_pubsFS.asp?status=picture](http://www.natgalscot.ac.uk/index.asp?centre=html/8-pubs/8_pubsFS.asp?status=picture) (last accessed March 17, 2010).
- 360 See <http://www.si.edu/copyright/> (last accessed March 17, 2010).
- 361 See, generally, The Rijksmuseum Amsterdam, available at <http://www.rijksmuseum.nl/index.jsp?lang=en>. (last accessed March 17, 2010).
- 362 The Eiffel Tower, FAQs, available at <http://www.tour-eiffel.fr/teiffel/uk/pratique/faq/index.html>. (last accessed March 17, 2010). “There are no restrictions on publishing a picture of the Tower by day. Photos taken at night when the lights are aglow are subjected to copyright laws, and fees for the right to publish must be paid to the SNTE.” *Id.*
- 363 See, e.g., Collaborating for Indigenous Rights, The National Museum of Australia Canberra, available at <http://indigenoustrights.net.au/> (last accessed March 25, 2010) <http://www.nma.gov.au/Indigenoustrights/default.html?alD=14>. See also Permits for Commercial Filming, Photography and Artistic Representation, Uluru - Kata Tjuta National Park, “All commercial film crews, still photographers, artists and sound recordists will need to apply for a permit to carry out commercial work in the Park,” available at <http://www.environment.gov.au/parks/uluru/visitor-information/permits-commercial.html> (last accessed March 25, 2010).
- 364 See, e.g., Christie’s, available at <http://www.christies.com/> (last accessed March 25, 2010).
- 365 Institut de Cultura: Museu de Ciències Naturals, Ajuntament de Barcelona, Conditions Governing Loans of Museum Material, available at [http://www.bcn.es/museuciencies\\_fitxers/imatges/FitxerContingut7453.pdf](http://www.bcn.es/museuciencies_fitxers/imatges/FitxerContingut7453.pdf). (last accessed March 18, 2010).

## GLOSSARY

**Archive.** A place in which public records or other important historic documents are kept. (Oxford English Dictionary)

**Assignment.** An author may license or assign his copyright to another party. An assignment is a transfer of a property right. Under an assignment of copyright, the rights owner transfers one, some or all his rights. If all rights are assigned, the person to whom the rights are assigned becomes the new owner of copyright. In some jurisdictions, not all rights may be transferred, however. In France, for example, an author's moral rights may never be given or sold to another party; they remain with the original author. In some of these countries, even economic rights are not transferable and may only be licensed, such as in Germany.  
See also "License," "Owner."

**Authenticity.** The quality of being authentic, or entitled to acceptance, [...] as being what it professes in origin or authorship, as being genuine; genuineness. (Oxford English Dictionary)

**Author.** Under copyright law, an author is the creator of an original work, i.e., an original intellectual creation. As such, an author can be – among other things – a writer, a film director, a sculptor, a choreographer or a music composer; the author may be an individual or a legal entity. In most jurisdictions, copyright protection comes into existence automatically upon the creation by an author of an original work. The author is not required to register his copyright. Some jurisdictions allow for joint ownership of copyright. In the context of TCEs, this means that a collectivity or community could potentially be considered an author.  
See "Collective rights."

**Collective Rights.** Rights that are owned collectively by a group of persons or a community, for example, collective ownership of trademarks or joint ownership of copyright. In the context of TCEs, if protection is sought, it is often the case that the most appropriate entity in which the protection should inhere may be a *group* of people: a tribe or other collective. Some jurisdictions provide for this possibility in their laws. Ecuador, for example, in its Constitution, recognizes "collective IP rights" on communities' ancestral knowledge (Art. 84); and its IP Law (No. 83 of 1989) establishes a *sui generis* system of collective intellectual rights of indigenous and traditional communities. A mixture of individual and collective customary rights and obligations may apply simultaneously to a work. Concerns have been raised by some indigenous peoples and traditional communities that existing copyright law does not recognize, provide for, or give legal effect to this "mixture" of individual and collective customary rights and obligations.

**Contract.** Generally, a contract is an agreement between two or more parties that creates obligations that are enforceable or otherwise recognizable at law.

**Copyright.** The term "copyright" (or sometimes "author's rights") refers to rights in relation to original artistic and literary works such as novels, writing, music, paintings and sculptures, films and technology-based works such as computer programs and electronic databases. It protects the particular manner of expressing an idea. Copyright protection comes into existence automatically upon the creation by the author of an original work; the author is not required to register his copyright. The author of a work, the initial copyright owner, has a bundle of "exclusive rights" to do certain restricted acts in relation to his work. These may include: copying the work; publishing, issuing or selling copies of the work to the public; performing the work in public; playing the work in public; showing the work in public; broadcasting the work or including the work in a cable

program service or digital media; making an adaptation of the work or doing any of the above activities in relation to an adaptation; and authorizing any other person to do any of the restricted activities listed above. For the purposes of the Publication, the term “creator” and “author” are used interchangeably, unless otherwise specified.

**Creator.** See “Author”

**Crown Copyright.** Crown copyright is a form of copyright created through policy, contract, or legislation and used by national governments of several Commonwealth jurisdictions. It provides special copyright rules for the “Crown” (State entities). Crown copyright generally covers works which are produced by employees of the Crown in the course of their duties. As such, most material authored by ministers and public officials of Commonwealth countries is protected by Crown copyright. In some jurisdictions, Crown copyright may also cover works commissioned by the Crown for governmental or policy purposes, such as private university research publications commissioned and funded by the Crown.

**Cultural Heritage.** The term “cultural heritage” encompasses several main categories of heritage:

1. Cultural heritage:
  - Tangible cultural heritage:* - movable cultural heritage (paintings, sculptures, coins, manuscripts, etc.)
  - immovable cultural heritage (monuments, archaeological sites, and so on)
  - underwater cultural heritage (shipwrecks, underwater ruins and cities and so on)
  - Intangible cultural heritage* (oral traditions, performing arts, rituals, and so on)
2. Natural heritage (natural sites with cultural aspects such as cultural landscapes, physical, biological or geological formations, and so on)
3. Heritage in the event of armed conflict.

**Customary Law.** A generic definition of “customary law” is “customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws.” (Black’s Law Dictionary) Indigenous and traditional communities have developed and established, through generations and custom, rules, protocols, values and principles, which are commonly/collectively understood and acknowledged as customary law and which may apply to TCEs and how they are to be treated or cared for, used or practiced. It should be noted that the way in which customary laws are embodied differ from one another. For instance, the laws could be codified, written or oral, expressly articulated or implemented in traditional practices. Another important element is whether these laws are actually “formally” recognized by and/or linked to the national legal systems of the country in which a people or community resides. In the context of the works of WIPO’s IGC, the draft provisions for TK and for TCEs indicate that any IP-related protection granted to TK and/or TCEs should be in line with the customary laws and protocols of the relevant communities.

**Derivative Work (or Adaptation).** A derivative work, or adaptation, is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is also a derivative work. The use of TCEs to create derivative works raises a number of policy issues, which are canvassed in this document.



**Digital Rights Management.** Digital Rights Management (“DRM”) is an umbrella term that refers to any technology used to control access and use of digital works. DRM is designed to control, monitor, and meter most uses of a digital work. Descriptively speaking, DRM is made up of two components: (1) a database containing information which identifies the content and right owners of a work and (2) a licensing arrangement that establishes the terms of use for the underlying work. DRM falls into two general categories: systems that utilize Technological Protection Measures (TPMs) and those that do not. More often than not DRM will rely on one or more TPMs. TPMs are technological methods or tools, or any kind of technology (device, product or process), intended to promote the authorized use of digital works. They may control (i.e., in most cases, prevent or restrict) access to, or uses (mainly copying) of these copyrighted works.

**Digitization.** Digitization is the process of representing an object, image, text or a recorded signal (usually an analog signal) in electronic form, especially in the form of binary digits. The term digitization is often used when diverse forms of information, including text, sound, images and moving images, are encoded in a single 0-1 binary code. Digitizing is the primary way of storing text, images and sounds in a form suitable for transmission and computer processing.

**Documentation.** The accumulation, classification, and dissemination of information; the material so collected. (Oxford English Dictionary)

**Domain Name.** Domain names are the human-friendly forms of Internet addresses, and are commonly used to find web sites. For example, the domain name wipo.int is used to locate the WIPO web site at <http://www.wipo.int>. By allowing the use of unique alphabetical addresses instead of numeric ones, domain names allow Internet users to more easily find and access web sites. The Internet Corporation for Assigned Names and Numbers (ICANN) has overall responsibility for managing the Domain Name System.

**Exceptions and Limitations.** Certain acts normally restricted by copyright may, in circumstances specified in the law, be done without the authorization of the copyright owner, for the benefit of society. These permitted acts fall under what are referred to as “exceptions” and “limitations.”

Article 9(2) of the Berne Convention provides a three-step guidance for deciding exceptions: “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

Article 13 of the TRIPS Agreement provides that “Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”

Article 10 of the WCT provides that “(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

These three provisions reflect what is referred to as the “three-step test.”<sup>332</sup>

There are two basic types of exceptions and limitations to copyright: (1) “free uses,” which are acts of exploitation of works which may be carried out without authorization and without an obligation to compensate the owner of rights for the use, and (2) “non-voluntary licenses,” under which the acts of exploitation may be carried out without authorization, but with the obligation to compensate the owner of rights.

Jurisdictions deal with exceptions and limitations differently. Civil law jurisdictions typically articulate a finite set of exceptions in their copyright laws, while common law jurisdictions typically describe the types of situations under which use of copyrighted works may be a “fair use,” or “fair dealing,” or similar concept, of those works.

**Fixation.** Fixation is the process or result of capturing a work or protected subject matter in a tangible or material medium. Typically in countries of the Anglo-American copyright system, fixation is a precondition for copyright protection. Fixation occurs, for example, when a live television broadcast is transmitted and simultaneously recorded on videotape. Fixation also occurs when a painting is completed or a song is recorded. Fixation is a problematic concept for TCEs since there is often no single manifestation of a TCE that would comprise the final “fixed” expression.

**Good practices.** Good practices include methods and techniques that have consistently shown results that are in some way superior to those achieved with other means, and which can be used as benchmarks. There is, however, no practice that is best for everyone or in every situation, and good practices tend to change over time depending on social, cultural and technological circumstances and advances. In the context of this Publication, the concept of good practices is important insofar as distinguishing them from norms or other rules. The Publication does not seek to impose standards or other obligations; it is meant to be a useful tool to describe the experiences and insights of institutions and organizations around the world in an effort to inform museums, libraries and archives of IP issues and options for the management of TCEs.

**Intangible Cultural Heritage.** “Intangible cultural heritage” is defined in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, as “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.” The Convention also states that “intangible cultural heritage” is manifested inter alia in the following domains: a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; b) performing arts; c) social practices, rituals and festive events; d) knowledge and practices concerning nature and the universe; e) traditional craftsmanship.

**Intellectual Property.** Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. IP comprises of two categories: industrial property, which includes patents, trademarks, industrial designs, and geographical indications; and copyright and related rights. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

**Library.** An [...] institution or establishment, charged with the care of a collection of books, and the duty of rendering the books accessible to those who require to use them. (Oxford English Dictionary)

**License.** An author may license or assign his copyright to another entity. A license is an authorization given by the rights owner (licensor) to another (licensee) to perform a certain act in respect of the work concerned. Often, the licensee is authorized to use the work in exchange for an agreed fee or royalty. Such authorization is often prescribed in a formal licensing agreement. It is usually limited to a certain territory, for a limited period of time and for limited, specific uses.

**Moral Rights.** Moral rights are enshrined in the Berne Convention at Article 6bis.<sup>333</sup> They are not incorporated in the TRIPS Agreement. National copyright laws handle moral rights quite differently. Moral rights generally include, *inter alia*, the right to be identified as the author or to claim authorship of a work (the right of attribution or paternity) and the right to object to derogatory treatment, distortion, mutilation or modification of their work (the right of integrity). In many jurisdictions, moral rights cannot be assigned or licensed to another person, although they may be waived. While moral rights are sometimes viewed by scholars as potentially appropriate to address some of the concerns expressed by indigenous peoples and traditional communities regarding the protection of TCEs, existing moral rights law only applies to those TCEs that are eligible for copyright protection. Under most laws, many TCEs do not meet the criteria for copyright protection and therefore currently do not benefit from moral rights.

**Museum.** A building or institution in which objects of historical, scientific, artistic, or cultural interest are preserved and exhibited. Also: the collection of objects held by such an institution. (Oxford English Dictionary)

**Originality.** Under copyright law, originality characterizes a work that it is its author's own intellectual creation, and is not copied from another work. In most copyright laws, a requirement for protection is that a copyrightable work exhibits a minimal level of originality; this threshold tends to be very low. For TCEs, which are often based on former works and whose validity is often dependant on faithful or near-faithful reproductions of past works, new iterations of a TCE may or may not be eligible for copyright protection, because of the originality requirement.

**Owner.** The rights owner is the person or entity to whom the IP rights belongs. In copyright law, the original (initial) owner is generally the author. If the author so chooses, he may assign or license his copyright to a third party. In Continental European law countries, moral rights are typically inalienable. (e.g., in France, moral rights inhere in the author only and cannot be transferred; in some of these countries, even economic rights are not transferable and may only be licensed, such as in Germany.) It is important to note that owning the physical manifestation of a work is different from owning the copyright in that work. For example, if an original oil painting is purchased, the purchaser can take home the painting but is not authorized to license an image of that painting to a cultural institution.

**Patent.** A patent is an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem. In order to be patentable, an invention must fulfill three main conditions. It must be capable of industrial application. It must show an element of novelty, i.e., some new characteristic which is not known in the body of existing knowledge in its technical field (called "prior art"). The invention must show an inventive step which could not be deduced by a person with average knowledge of the technical field. Its subject matter must be accepted as "patentable" under law. In many countries, scientific theories, mathematical methods, plant or animal varieties, discoveries of natural substances, commercial methods, or methods for medical treatment (as opposed to medical products) are generally not patentable.

**Perpetuity.** The term 'perpetuity' is normally used in the context of IP to qualify a period of protection that lasts indefinitely. Copyright protection subsists in a creative work for a finite period of time. The Berne Convention requires that this period of time be no less than the life of the author plus fifty years beyond his death. National laws are free to provide for a longer period of time, but perpetual protection does not currently exist in national copyright laws. Many indigenous peoples and traditional communities are of the view that protection for TCEs should be perpetual, as this corresponds best to their needs and to the customary laws and values relating to most of their TCEs.

**Policy.** A policy is a program of actions or decisions adopted by a person, group, or government, or the set of principles on which they are based, which are oriented towards a long-term purpose or to a particular problem. Policies are sometimes but not always embodied in legislation and usually apply to a political entity (such as a country or any of its administrative subdivisions) as a whole.

**Preservation.** The action of preserving from damage, decay, or destruction; the fact of being preserved. (Oxford English Dictionary)

**Protocol** Protocol, as used in this Publication, generally refers to a code of conduct or a standard of behavior, often emanating from a community or institution, which is considered correct or desirable.

**Public Domain.** The public domain is the scope of material that can be used and exploited by everyone without authorization, and without the obligation to pay remuneration – as a rule because of the expiry of their term of protection, or due to the absence of an international treaty ensuring protection for them in the given country, or since the conditions of protection are not fulfilled. The role, contours and boundaries of the public domain are under active discussion in several forums, including at WIPO. The role of the public domain is relevant to TCEs, as preexisting traditional culture as such and particular expressions thereof are generally not protected by current copyright laws and are treated, from the perspective of the IP system, as part of the public domain. To the extent that TCEs and knowledge systems are in the public domain they may be freely used by artists, writers, researchers, industry and any other user. Indigenous peoples and traditional communities contest that their cultural expressions and knowledge systems may be in the public domain. Yet, others argue that protecting such materials with IP-like rights would inappropriately restrict the public domain and therefore the ability of users to take advantage of it. This is a complex policy debate and there are diverse views.

**Publication.** “Publication” is a technical term in copyright law. One of the exclusive rights sometimes granted to an author is the right to publish his work. “Publication” generally means the making available of copies, with the consent of the author, in a quantity and manner that is suitable to satisfy the reasonable requirement of the public. The Berne Convention gives a definition of “published works” at Article 3(3).<sup>334</sup> The exact definition of a “published” work depends on the jurisdiction. In some countries, for example Germany, works of visual art (such as sculptures) are considered to be published if they have been made permanently accessible to the general public (erecting a sculpture on public grounds, for example, would constitute publication in Germany). Australia, the United Kingdom and the United States of America generally require the distribution of copies as a prerequisite to consider a copyrighted work “published.”

***Sui generis.*** Of one's or its own kind; peculiar. (Oxford English Dictionary)

**Resale Right.** The resale right entitles artists (or their heirs) to a royalty based on the resale price of an original graphic or plastic work of art subsequent to the first sale or transfer by the artist, when art market professionals (such as an auctioneer, a gallery or any other art dealer) participate in the sale. The resale right, where it exists, forms an integral part of copyright and is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the economic situation of artists who benefit from successive exploitations of their works. The resale right model does have potential in terms of reducing inequities in relation to the resale of TCEs.

**Restoration.** The action, process, or result of restoring something (esp. a work of art or literature) to an unimpaired or perfect condition; renovation or reconstruction intended to restore something to its (supposed) original condition. (Oxford English Dictionary)

**Subject Matter.** This concept refers to what can be protected by IP. The type of IP protection that applies depends on the subject matter. Copyright, for example, covers original works, i.e., such subject matter as, *inter alia*, art, literature, computer programs and music. Patent law covers inventions that exhibit a certain threshold of novelty, among other criteria. A TCE's subject matter, often comparable to subject matter covered by copyright and/or related rights law, is not always categorized as such. This has to do with the nature of TCEs and the inadequacy of copyright law's structure for their protection. It should also be noted that some traditional healing rites, religious rights of passage and festival performances, for example, often encompass both potentially patentable TK and copyrightable TCEs. See "Copyright", "Patent", "Trademark".

**Trademark.** A trademark is a distinctive sign used to differentiate identical or similar goods and services offered by different producers or service providers. Trade marks can include words, logos, colors, sounds, smells – or any combination of these. Trademarks are a type of industrial property, protected by national intellectual property laws and international treaties. Trademark protection is territorial, but it is possible to apply for international protection under, for example, the Madrid System. Trademark protection for TCEs may be sought in some instances; it has the advantage of potential perpetual protection, as long as the trademark is "used." Trademarks must be used in the context of trade (in business transactions), and therefore may not be appropriate for TCEs for which no commercial value is to be exploited.

**Traditional Cultural Expressions / Expressions of Folklore.** WIPO uses the terms "traditional cultural expressions" (TCEs) and "expressions of folklore" (EoF) to refer to tangible and intangible forms in which TK and cultural heritage are expressed, communicated, manifested and passed on within indigenous and traditional communities. These terms have replaced the term "folklore", which had negative connotations. Examples include traditional music, performances, narratives, names and symbols, designs and architectural forms. The terms are used as interchangeable synonyms, and may be referred to simply as "TCEs." The use of these terms is not intended to suggest any consensus among WIPO Member States on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws. Current discussions within the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) use the following description of the term "traditional cultural expressions" (or "expressions of folklore"): "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- musical expressions, such as songs and instrumental music;
- expressions by action, such as dances, plays, ceremonies, rituals and other performances;
- whether or not reduced to a material form; and
- tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:
  - a) the products of creative intellectual activity, including individual and communal creativity;
  - b) characteristic of a community's cultural and social identity and cultural heritage; and
  - c) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

The specific choice of terms to denote the protected subject matter is usually determined at the national and regional levels.

**Work.** The kinds of works covered by copyright include: literary works such as novels, poems, plays, reference works, newspapers and computer programs; databases; films, musical compositions, and choreography; artistic works such as paintings, drawings, photographs and sculpture; architecture; and advertisements, maps and technical drawings.

## FAQ

The below scenarios, information and general answers do not constitute legal advice but are meant to illustrate some common issues and provide some approaches to solving them.

### 1. What is the difference between copyright, trademarks and patents?

A **patent** for an invention is the grant of a property right to an inventor, for a finite period of time. Internationally, the requirements for and benefits from an issued patent vary but, generally, a patent must be new (original), non-obvious (there must be an inventive step in its creation that would not be obvious to someone in the profession or field), and the invention must be useful. Different jurisdictions describe the contours of these requirements differently but they tend to be fairly similar. Another jurisdictional difference can be patentable subject matter; for example, in some countries, patenting a life form falls outside the scope of subject matter allowed in the patent regime.

A **trademark** is a word, name, symbol or device which is used in business in conjunction with goods or services to indicate their source and to distinguish them from others. Trademarks are used to prevent other entities from using a confusingly similar mark.

**Copyright**, the form of intellectual property discussed most thoroughly in this publication, is a form of protection provided to the authors of original works including literary, dramatic, musical, artistic, and certain other intellectual works, both published and unpublished. Copyright protects the form of expression rather than subject matter. The bundle of rights that accompanies copyright protection includes the right to authorize copies and derivative works. Depending on the jurisdiction, copyright includes moral rights which allow a copyright owner to exercise a type of “quality control” over his or her work regardless of physical possession.

### 2. If the museum owns the physical manifestation of an artwork, doesn't that mean it can freely use or license the image?

No. Owning an artwork in its physical form is completely separate from owning copyright in that work. In many jurisdictions, it is presumed that copyright remains with the author or artist unless it is specifically assigned or granted to another entity. In the TCE context, many institutions have policies in place that promote prior informed consent to the reproduction, use and display of TCEs, depending on the wishes of the relevant community.



### 3. How does copyright law function on the international level? Our museum has a contemporary collection and we often exhibit contemporary art from other museums around the world. What do we need to know about other countries' copyright laws?

While there is no such thing as international copyright law *per se*, there is an international copyright convention to which most countries are party, the Berne Convention. One of the foundational aspects of this convention is the “national treatment” concept whereby countries who are party to the convention must treat the work of nationals from other member countries the same as they treat the work of their own nationals.

That being said, inter-museum exhibitions are often covered by individual contracts and, as such, individual museums have the capacity to specify how copyright concerns should be handled. For example, if your museum, located in the Netherlands, is exhibiting the paintings of a French artist who has retained copyright in his works, and if your museum wants to produce exhibition posters to advertise the exhibition throughout Amsterdam, Dutch copyright law would apply to his paintings during the time his works are in the Netherlands absent some other bilateral agreement regarding traveling museum exhibitions and/or absent a contract between your two institutions specifying a different arrangement. Yet, the conditions upon which any cultural institution will loan its collection to another institution very often requires that any reproduction of any part of the collection be funneled through the originating institution. The British Library, for example, makes the following stipulations clear before any other institution borrows from it:

#### ***Photography, Filming and Reproduction***

- Images for reproduction can be obtained from British Library Imaging Services. The borrower should contact British Library Imaging Services regarding charges, licensing and copyright. Orders for reproductions/permissions should be made online.
- Filming is not permitted for commercial purposes.
- Permission to film for promotional or educational purposes must be sought, in advance, from the Loans Registrar.

#### ***Publication right***

- Where an object has not been published and is then published or displayed to the public by the borrower, all publication rights will be assigned back to the British Library.<sup>356</sup>

A standard contract in the United States on this issue might read

*The Exhibitor hereby agrees that the loan of the works under this Agreement is solely for purposes of exhibition and that no other uses shall be made of the work, such other uses including but not being limited to commercial exploitation, broadcasts, or other reproduction. The Exhibitor further agrees that the works shall be kept at the following location: \_\_\_\_\_, and shall not be moved or displayed elsewhere without express, written consent<sup>357</sup>*

**4. As a museum with both copyright-protected and public domain art, what do we need to know about moral rights?**

Moral rights are an aspect of copyright law that can vary greatly from jurisdiction to jurisdiction. The strongest set of moral rights is found in France; some of the most watered-down are in the United States. Depending on the applicable law, therefore, moral rights apply to artworks that are covered by moral rights law at a given period in time. This would mean having to communicate with an artist or his heirs, estate or relevant copyright society when using the artwork in a manner that could call moral rights provisions into question. Moral rights can include the right of attribution to the artist, the right of integrity of the artwork, the right to use a pseudonym, and the right to remain anonymous, among others. Moral rights offenses have included painting a sculpture a different color, exhibiting an artwork in a different place than was initially specified ("site-specific" artwork), dismembering a multi-part artwork into several different pieces, and adding ribbons and wreaths to a sculpture at Christmas time. If your organization is working directly with a contemporary artist, a good starting point is to understand and implement his wishes for his artworks' display and attribution.

**5. Our museum is mounting an exhibition revolving around the theme of tribal tattoos. We're putting together a stylish educational pamphlet to accompany the exhibition and we'd like to use a photograph that seems to still be under copyright but for which we cannot find any information as to who the photographer is. Can we still use the photograph?**

Orphan works are a class of copyrightable works whose right owner is either unidentifiable or whose contact information cannot be ascertained. Currently, it will likely depend on your jurisdiction to know how to go about the appropriate procedure for dealing with this kind of work. Some jurisdictions are beginning the legislative process for making orphan works available to parties who, after a reasonably diligent search, are unable to locate an author or artist.

**6. As a small museum with an important art collection but small physical building in a remote neighborhood, it seems wise and in line with our mission to digitize our collection. We are unable to incur many more costs than it would take to technically digitize our artworks, however, such as legal counsel. What is our best course of action?**

While it is not the intent of this list of FAQs to give legal or business advice, the following are some factors to consider when making this decision:

1. Owning a physical art object does not entitle a museum to publish or copy it. These are separate IP rights. Before digitizing any artwork that is still under copyright, ensure that the museum also has permission to do so from the copyright owner, be that the artist, the artist's estate or a collecting society.
2. Digitizing an entire collection is an expensive endeavor. Aside from technical IT expertise, it will be paramount to keep good records of the digitization process and will very unlikely be a one-time effort as acquisitions and de-accessioning are regular parts of most museums' practice.

3. While the business-sense aspect of digitizing a collection falls outside the scope of this writing, some essential intellectual property aspects of digitizing a collection that should not be overlooked include:

**Artwork under Copyright:** Before photographing and/or digitizing a work, a museum should make certain that it is licensed to photograph and digitized that work. Authorizations should be obtained from the artist of the work that is the subject matter of the digitized photograph or from the artist's estate or authorized copyright holder.

**Photographs under Copyright:** Digitizing an existing photograph is also a reproduction for purposes of copyright law and, as such, museums should ensure that they have the right to digitize the photograph. A museum can either hold the copyright in a photograph or it can obtain a license from the photographer (or the photographer's estate or copyright agent.)

**Moral Rights:** Moral rights can be an issue when digitizing an artwork. If colorization is too different from the original or if any blurring or improper cropping occurs, for example, these rights may come into play. While it would be time consuming and cumbersome to verify with an artist or photographer each and every digital image, a museum can obtain a full or partial moral rights waiver for small deviations for digitization purposes or make other mutually agreed-upon arrangements with the artist or photographer.

## 7. Under the rubric of digitizing a collection and/or having an online presence, what does my institution need to know about informing website viewers about copyright policy?

Copyright law functions whether the public is informed or not. A bricks-and-mortar example of this is a vignette where there is a copyrighted book, a person, and a copy machine. An individual is expected to know, for example, that it is illegal to copy the entire book for a friend by means of the copy machine. Most books have copyright notices on the title page informing a potential reader what he or she can and cannot do with the book. Websites function much the same way although their digital nature renders copying much easier and inexpensive than using a copy machine. Websites handle the copyright notice in different ways. One example of a common type of notice is available at the National Galleries of Scotland Picture Library website:

The Picture Library manages an archive of more than 100,000 images of works in the National Galleries of Scotland's collection and works on long-term loan. Any copying of our works must be properly authorised. We can provide assistance and grant the necessary permissions and licenses for commercial, editorial and scholarly use of these images.

Formats: Works are available as 5x4 inch colour transparencies, black and white prints, colour prints and a selection of works are available as digital files.

The Picture Library. National Galleries of Scotland. Dean Gallery, 73 Belford Road, Edinburgh EH4 3DS. Telephone: + 44 (0)131 624 6258 or 6260 Fax: + 44 (0)131 623 7135

Email: [picture.library@nationalgalleries.org](mailto:picture.library@nationalgalleries.org)

A selection of the National Galleries of Scotland Collection can also be found at Online Collections.

We are members of the British Association of Picture Libraries and Agencies and partners in Images of Art and Culture, a collaborative marketing group for national cultural collections. A number of our images are also available to view through SCRAM (Scottish Cultural Resources Access Network). We also support the Picture Research Association.<sup>358</sup>

The information is straightforward. It refers to copyright law only by indicating that copying must be authorized and then provides contact information so that a copier can find help. Another example of a copyright policy where the digitized collection contains possibly sensitive information is at the National Museum of the American Indian. While the Smithsonian webpage (used for all Smithsonian institutions, including the NMAI) itself is too long to cite in its entirety, it includes substantial explanations of what content is protected by IP laws, what fair use is, the limitations put on commercial use, how trademarks are used on the website, and how links to third party websites are used. It then goes on to disclaim warranties of merchantability, fitness and infringement for the text and images on the website and describes how downloading, printing or otherwise using website content is the sole responsibility of the website user and that said user warrants that he or she will limit use of the content to fair use. Furthermore, the copyright policy webpage has a FAQ section outlining image use in various scenarios from obtaining permission to using images in a school report.<sup>359</sup>

As such, there is no single way to present copyright policy. To better educate your website's viewers, a more complete policy is preferable to simply saying "all rights reserved," or using other legal language that the public might not understand.

## **8. What are personality rights, publicity rights and privacy rights? Are they related to intellectual property? What does my institution need to know about them?**

Privacy law does not fall under the rubric of IP law but the two do sometimes come up within the same situation. Like with any area of law, different jurisdictions address legal ideas differently. Broadly, however, personality rights are understood to be an umbrella term for publicity rights and privacy rights. A right of publicity is understood to operate similarly to a trademark: it is the right to keep one's image and likeness from being commercially exploited without permission or compensation springing from an agreement. A privacy right – a vast and debated field of law in itself – is sometimes understood as the right to be left alone, sometimes takes on other characteristics but generally operates non-commercially.

Museums have come across these fields of law when, for example, selling derivative work gift shop items that include the likeness of an individual. The Museum of Contemporary Art in Los Angeles was selling an array of goods such as notecubes and t-shirts bearing the image of a photocollage by artist Barbara Kruger. The Kruger work includes a photograph by a third party showing the partially enlarged right eye of a woman overlain with the words "It's a small world but not if you have to clean it." The woman whose eye was used in the photograph – and then in the photocollage – claimed that the work violated her right to privacy as well as the photographer's copyright. Both her claims failed in the United States but this example is demonstrative of issues that have not been fully explored on the international legal platform. Had the jurisdiction been different, had the woman been a celebrity, had more of her face been a part of the photocollage, the result may have been different. The United States also permitted free speech principles to trump publicity rights with regard to a painting of golfer Tiger Woods but other jurisdictions may not have done so.

For TCEs, this issue could require more vigilance. Certain tribes and cultures find great offense in the reproduction of their tribal elders' likenesses, for example. While there is no separate legal regime in this vein for TCEs, museums should take care to foster their relationships with any tribes or cultural groups whose creations they exhibit and manage. Generally, it would behoove museums to understand the privacy and publicity rights law in their jurisdiction so that they neither exhibit nor reproduce images of individuals who have not given consent to the artist or photographer for either activity.

## **9. What is the relationship between copyright and trademark? Can a trademark also be copyrighted? And where do TCEs fall?**

Trademark and copyright law generally operate independently of each other but do not prohibit the other legal mechanism from applying. For example, the Rijksmuseum in Amsterdam utilizes a graphic that operates as its logo. It ostensibly places this logo on its publications and on promotional materials linked to its exhibitions. As such, the logo operates as a trademark. The logo is also copyrightable, however, as an original expression. It can be found on the Museum's website along with a wide array of other copyrighted material, ranging from artwork to exhibition information.<sup>360</sup>

A TCE in the form of a symbol or sign could also ostensibly fall under both copyright and trademark rubrics although, as is pointed out throughout this compendium, that is unsettled internationally and within most individual jurisdictions. Legally, there are reasons that a TCE may or may not be copyrightable and there may be reasons that the people from whose tribe or group object to copyright covering that TCE. If a TCE is being used as a trademark (to identify goods or services in commerce), the Indigenous group or tribe from which that TCE comes may or may not condone such usage so, while a TCE may legally or technically be used as a trademark, it is probably not advisable to do so unless the prior informed consent of the relevant cultural group is obtained.

## **10. What does my institution need to know about the copyrightability of our physical location? We recently spent a vast amount of money to have a celebrity architect renovate the building and a local tourist shop is selling photograph postcards of the building.**

Depending on your jurisdiction, a photograph of a building that is visible from a public place (such as a street, a park, etc.), may be photographed and that photograph may be used for commercial gain without infringing the copyright of either the architect or the building owner. This is made explicit in the laws of the United States, the United Kingdom and Japan, for example. There are some exceptions, however. In Paris, a lighting display has been installed on the Eiffel Tower and it is forbidden to photograph it, and therefore to photograph the Tower at night.<sup>361</sup> In New York, the Flatiron Building has also gained status as a trademark of Newmark & Co. Real Estate. As such, the real estate company has settled some cases out of court that involve reproductions of the building. The general international standard, however, is that buildings that are visible from a public place may be photographed and that photograph may be used for commercial gain, ranging from postcards to movies.

## **11. What is a "thumbnail" image? Is it permissible to use them without getting permission from a copyright owner?**

With regard to a website layout, a "thumbnail" is generally understood to be a small, reduced-size graphic image. It is used for easy recognition, much as a text index is used for words. Visual search engines, such as Google Images®, utilize thumbnail images. Whether they can be used in a cultural website context may depend on several factors. In the United States, a 2003 Ninth Circuit case ruled that thumbnails comprised a fair use of copyrighted imagery. That situation involved a photographer whose photographs, in thumbnail format, were included in a search engine. While fair use may therefore be applicable in the United States in this kind of scenario, it does not address the moral rights of the photographer. An artist may not wish his or her painting or photograph to be shrunk and placed on a

museum's website as representative of his or her work. Furthermore, in other jurisdictions, use of a thumbnail may not be considered fair use at all. In Australia, for example, "fair use"-type exemptions are currently much narrower. Because a cultural institution aims to present the art it houses in the most favorable light possible, use of thumbnails should be considered in light of many things, including moral rights and TCE sensitivities, an institution's mission and relationship with its artists, and the purpose of the thumbnail (*i.e.*, for simple indexing purposes or to show to the public).

## **12. What could we add to our website to promote prior informed consent for using TCEs, even if it's not a legal requirement?**

There are several proactive measures you can take in an effort to handle your collection appropriately. Firstly, address the issues in the "copyright" or "reproductions" section of your website. Explain some of the differences between your jurisdiction's copyright law and the wishes/requirements of the culture whose artwork you are exhibiting (if you have taken the appropriate steps to ensure that the relevant culture is comfortable with its artwork being exhibited at all). Become knowledgeable about the cultures whose works you are exhibiting or representing. For example, the National Museum of Australia Canberra displays a "warning" along the top of its webpages: "Indigenous Australians are advised that this website includes images or names of people now deceased."<sup>362</sup>

Digital rights management may also be something to consider. It is possible to technologically "protect" web images against downloading or modification or to utilize "flash" technology so that the images are not static and therefore not downloadable.<sup>363</sup>

## **13. My institution, rich in tribal art and archaeology, often enters into agreements with other cultural institutions around the world to allow for traveling exhibitions. Given the fact that there is no legal instrument applicable internationally for the protection or proper handling of these pieces, what can we do to ensure that our policies are complied with at a host museum?**

Bilateral contracts offer a very good opportunity for your museum to spell out its expectations and even to mention specific requirements for the handling and prospective reproduction of certain sensitive pieces. The Institut de Cultura: Museu de Ciències Naturals in Barcelona, for example, uses a clause in its Conditions Governing Loans of Museum Material:

The publication – by photograph, movie, video, DVD, molds, or any other type of reproduction of the loaned specimens – must be authorized by the Museum prior to publication. Approval of reproductions intended for scientific publication will be determined by the appropriate Museum technician. The management of the Museum will be responsible for authorizing and determining under what conditions material loaned for public or commercial programs may be reproduced.<sup>364</sup>

While different types of stipulations would be made for the handling and reproduction of cultural pieces that include TCEs, it is important to note that your museum can require compliance with whatever conditions you deem necessary to effectively and appropriately handle your collection.

**14. Wouldn't current IP systems provide a workable avenue for indigenous and traditional peoples to market and profit from their cultures? My institution's gift shop has several tradition-inspired souvenirs and jewelry and these items are top sellers.**

Some tribes and cultural groups are happy to commodify portions of their cultural heritage. In this vein, the New Zealand Maori and some Native groups in Alaska for example have created certification marks that demonstrate to would-be consumers that certain pieces of art or handicraft are authentically made by those groups of people. That being said, making a profit from cultural heritage is not always something that indigenous people are interested in at all; maintaining the integrity of and respect for certain TCEs is of paramount importance.

It is often the case that cheaply-made "fakelore" by people who do not belong to a certain people or community is marketed as if it were authentic. If your institution is selling goods that are "inspired by" but not "made by" a certain people or community, you should ensure that that is made clear to the public.

**15. As a jewelry designer inspired by the works at the Musée du Quai Branly in Paris, what should I mention – or not mention – when marketing my jewelry?**

The answer depends quite heavily on the particular details of your situation. To show respect for the people or culture from which you are drawing your ideas, it may be a good idea to mention that on the tag you attach to your jewelry. That being said, if you misconstrue – inadvertently or not – any important cultural symbols and somehow distort images that would cause offense to that culture, making the connection between your work and their cultural heritage may cause offense. If possible, contact the relevant curator at the museum, as they may have a working relationship with the people or community whose art you are working from, and ask specifically how or whether they would like to be attributed.

Otherwise, this Compendium addresses some of the characteristics of "derivative works," copyright infringement and misappropriation. You should never advertise or market your jewelry as if it were made or endorsed by a people or community unless that is the case. To determine whether and how to credit the culture from which you are drawing your ideas, direct communication is often the best route, followed by transparent marketing tactics that indicate that your work is not made by indigenous artisans.



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